In The
SUPREME COURT of the UNITED STATES
OCTOBER TERM 1958

No. 324

ET&WNC TRANSPORTATION COMPANY,
a corporation,
Appellant

vs.

JAMES S. CURRIE, Commissioner of Revenue
of the State of North Carolina,
Respondent

ON APPEAL FROM THE SUPREME COURT OF THE
STATE OF NORTH CAROLINA

JURISDICTIONAL STATEMENT

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JURISDICTIONAL STATEMENT

Appellant appeals from the judgment of the Supreme Court of the State of North Carolina entered in this action on the 3rd day of July, 1958, affirming the judgment of the Superior Court, County of Wake, State of North Carolina, and submits this statement in support of the contention that the Supreme Court of the United States has jurisdiction of the appeal and that a substantial question is presented.

OPINION BELOW

The opinion of the State Supreme Court in this action is officially reported at 248 N. C. 560, and unofficially reported at 104 S. E. 2d 403. A copy of the opinion and judgment of that Court is attached hereto as Appendix "A". Copies of the Superior Court's (Trial Court's) judgment, dated October 30, 1957, together with a stipulation of facts, to which reference is made in said judgment, are attached hereto as Appendix "B". They have not been reported.

JURISDICTION

ET&WNC Transportation Company, a Delaware corporation, initiated proceedings in the Superior Court of Wake County, State of North Carolina, against Eugene G. Shaw, Commissioner of Revenue of the State of North Carolina to recover taxes paid under protest. The action was brought pursuant to North Carolina General Statutes 105-267, allowing suit for return of taxes paid under protest. Appellant contended that the taxes were imposed in contravention of the United States Constitution and that the taxing statute under which the taxes were collected was violative of the Commerce Clause and Due Process Clause of the United States Constitution.

By order of the Superior Court of Wake County, James S. Currie, successor in office to the original defendant, was substituted as party defendant.

The judgment from which the appeal is taken is the judgment of the Supreme Court of the State of North Carolina, entered on the 3rd day of July, 1958, following the decision of that Court upholding the validity of the taxing statute involved. The decision of the Supreme Court of the

State of North Carolina was rendered on the 30th day of June, 1958. Notice of appeal was filed by Appellant in the Supreme Court of the State of North Carolina on September 19, 1958.

The jurisdiction of the Supreme Court of the United States to review the decision and judgment of the State Supreme Court by direct appeal is conferred by 28 U.S.C. 1257 (2) and 2101 (c) and is sustained by the following cases: *Michigan Wisconsin Pipe Line Co.* v. *Calvert,* 347 U. S. 157, 74 S. Ct. 396 (1954); *Railway Express Agency, Inc.* v. *Commonwealth of Virginia,* 347 U. S. 359, 74 S. Ct. 558 (1954); *Memphis Steam Laundry Cleaner* v. *Stone,* 342 U. S. 389, 72 S. Ct. 425 (1952); *Freeman* v. *Hewit,* 329 U. S. 249, 67 S. Ct. 274 (1946). In *Charleston Federal Savings and Loan Ass'n* v. *Alderson,* 324 U. S. 182, 65 S. Ct. 624 (1945), the court stated (p. 185):

> "Where it appears from the opinion of the state court of last resort that a state statute was drawn in question, as repugnant to the constitution, and that the decision of the court was in favor of its validity, we have jurisdiction on appeal."

STATUTE INVOLVED

The pertinent statutes involved in this action, at all times relevant to this case, appeared as Section 105-134 and 105-136 of the General Statutes of North Carolina. These statutes and the statutory history are set forth and attached hereto as Appendix "C".

QUESTIONS PRESENTED

A. Are Sections 134 and 136 of Article 4, Chapter 105, of the General Statutes of North Carolina in conflict with,

and thus invalid and void, under the *Commerce Clause*, Article 1, Section 8, Clause 3, of the Constitution of the United States, insofar as it imposes a tax on the net income of a foreign corporation, undomesticated in North Carolina, which is engaged exclusively in the interstate transportation of freight by motor truck within the State of North Carolina and which is not authorized by that state to do intrastate trucking or other local business and which does not do intrastate trucking or intrastate business in North Carolina?

B. Are Sections 134 and 136 of Article 4, Chapter 105, of the General Statutes of North Carolina in conflict with, and thus invalid and void, under the due process clause of the Fourteenth Amendment of the Constitution of the United States, insofar as it imposes a tax on the net income of a foreign corporation, undomesticated in North Carolina, which is engaged exclusively in the interstate transportation of freight by motor truck within the State of North Carolina and which is not authorized by that state to do intrastate trucking or other local business and which does not do intrastate trucking or intrastate business in North Carolina, and whose activities in North Carolina are in furtherance of interstate commerce exclusively, carried on under the Commerce Clause of the Federal Constitution and the Federal Motor Carrier Act of 1935 as amended (USCA, Title 49, Section 301, et seq)?

STATEMENT OF CASE

ET&WNC Transportation Company, Appellant here, is a Delaware corporation, with its principal office in Johnson City, Tennessee. (R. P. 21, f. 1).[1]

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[1] References are to stipulated facts in the printed record before the North Carolina Supreme Court, which stipulated facts the Trial Court found to be facts in its judgment.

The Appellant has no principal office in North Carolina, and, in fact, has no offices of any kind in North Carolina except such as are incident to its motor freight terminals, which are necessary for its interstate operations in North Carolina. (R. P. 21-22, f. 1). It is not domesticated in North Carolina and never has been. It has not been authorized by the State of North Carolina to do intrastate trucking and does not engage in intrastate trucking in that state. All of its business and operations in North Carolina are and always have been exclusively interstate in character. (R. P. 22, f. 1).

Appellant is a common carrier of freight for compensation by motor vehicles in interstate commerce only except in Tennessee, where it does an interstate and intrastate business. This intrastate business in Tennessee is under and within the jurisdiction of the Tennessee Public Service Commission. With the exception of Tennessee, Appellant's business is the interstate transportation or hauling of freight by motor truck between the States of North Carolina, South Carolina, Virginia, Tennessee and Georgia. All of its interstate business is authorized, permitted, supervised and directed under and within the jurisdiction of the Interstate Commerce Commission under and in accordance with the Federal Motor Carrier Act of 1935, and amendments thereto (49 U. S. C. 301, et seq.), and the Commerce Clause of the Federal Constitution (U. S. Const. Art. 1, Sec. 8, cl. 3) (R. P. 22, f. 1).

Appellant maintains freight terminals at various places in North Carolina but solely for its interstate business and operations. These terminals are manned by employees who usually live in North Carolina but whose duties pertain only to Appellant's interstate activities. (R. P. 23-24, f. 5).

Appellant owns no real estate in North Carolina and

rents these terminals from third parties. Appellant owns no personal property in North Carolina except such pickup and delivery trucks necessary for its interstate business and such terminal furniture, fixtures and equipment as are necessary for the terminals. (R. P. 24-25).

Appellant transports or hauls into North Carolina interstate freight only by its interstate or over-the-road motor vehicles, which are usually tractor semi-trailer units. When this freight is received at the various terminals, it is delivered to the consignees either direct from the over-the-road vehicles or in delivery trucks stationed at the respective terminals. These same delivery trucks pick up interstate freight from shippers or consignors in North Carolina, which is destined for or consigned to points or parties outside the State of North Carolina. This freight is then taken to the terminal where it is billed and loaded into interstate trucks and transported to destinations beyond and outside of North Carolina. (R. P. 24, f. 5). Usually, when a full truckload of freight is shipped to or from a customer in North Carolina, the over-the-road trucks of Appellant go directly to the customer's place of business, although sometimes the trucks go by the terminal when it is too late at night to deliver freight or to commence its interstate journey, or when Sunday or a holiday intervenes. (R. P. 24-25).

In the case of less than truckload shipments, Appellant's pickup trucks gather the freight from customers for assembly into full truckloads at Appellant's terminals maintained within the State of North Carolina. These pickup trucks, either delivering or picking up shipments of freight, act merely as a part of the interstate transportation of freight. (R. P. 25, f. 5).

Appellant does not handle any shipments originating at

points in North Carolina destined to other points in North Carolina and handles only that freight which either originates outside of North Carolina or is destined outside of North Carolina. (R. P. 25, f. 5).

During its fiscal year from July 1, 1954, to June 30, 1954, Appellant paid rentals on its terminals in North Carolina in the amount of $21,911.00. During this year, it paid to North Carolina the following taxes:

Gasoline taxes of	$38,868.00
Truck license taxes of	6,294.00
Personal property taxes of	394.00
N. C. unemployment taxes of	3,338.00
Intangible property taxes of	60.00
Total taxes paid in North Carolina	$48,954.00

In addition, it paid substantial rentals and taxes in other states in which it operated except the State of Virginia. (R. P. 25, f. 6).

During the fiscal year ending June 30, 1955, and June 30, 1956, the over-the-road vehicles which Appellant operated between the various states were largely based and taxed in the State of Tennessee and used Tennessee license plates in the Appellant's operations under reciprocal agreements between Tennessee and the other states in which Appellant operated, by which the over-the-road motor vehicles were taxed and licensed in the state of the carrier's domicile or principal place of business, and excused from further license taxes in the other states in which the carrier operates. (R. P. 26, f. 6). Under the reciprocal agreement between North Carolina and Tennessee, Appellant paid license plate taxes to Tennessee for its over-the-road ve-

hicles in the sum of $71,886.38, for the fiscal year ending June 30, 1955. (R. P. 26, f. 6).

During the fiscal year from July 1, 1955, to June 30, 1956, Appellant paid substantially the same rentals on its terminals in North Carolina and substantially the same amount of taxes in North Carolina as during the preceding fiscal year, as well as substantial rentals and taxes in other states in which it operated except Virginia, and paid $78,-589.00 license plate taxes to Tennessee on its over-the-road vehicles. (R. P. 26-27, f. 7).

The Respondent herein, the Commissioner of Revenue of the State of North Carolina, contends that Appellant was subject to taxation under North Carolina General Statutes 105-134 and 105-136, and thus seeks to impose upon Appellant taxes for the period from January 1, 1949, to June 30, 1955, in the sum of $15,812.80.

Respondent herein, the Commissioner of Revenue of the State of North Carolina, by letter of August 31, 1954, first requested Appellant to furnish him with information with respect to its operations in North Carolina and to state reasons why income tax returns had not been filed. (R. P. 27, f. 8). Thereafter, the information requested was furnished by Appellant in a letter dated September 9, 1954, in which letter Appellant briefly set forth substantially the same reasons it later set forth in its complaint why it was not subject to income taxes in North Carolina. (R. P. 27, f. 8).

Respondent, on the 7th day of October, 1954, notified Appellant that he proposed to assess and levy a tax upon income of Appellant pursuant to North Carolina General Statutes 105-134 and 105-136, and again demanded that information be furnished from Appellant's records so that

the amount of the tax to be assessed and levied might be determined. (R. P. 27, f. 8).

At the request of Appellant, a hearing was held in the office of Respondent at Raleigh, North Carolina, on January 3, 1955, and Appellant again contended, by giving substantially the same reasons later given in its complaint, why it was not liable for the payment of any taxes proposed to be assessed and levied by Respondent. (R. P. 27, f. 9).

On June 17, 1955, Respondent directed Appellant to file income tax returns. On June 28, 1955, Appellant prepared and filed income tax returns for the years ending on June 30, 1950, 1951, 1952, 1953 and 1954. (R. P. 28, f. 11).

On June 29, 1955, Respondent made an assessment against the Appellant for income taxes for the years for which returns were filed. Thereafter, Respondent made additional assessments against Appellant for income taxes alleged to be due for the period of time between January 1, 1949, and June 30, 1949, and for the year beginning July 1, 1954, and ending June 30, 1955. (R. P. 29, f. 15, 18).

In accordance with the statutory procedure, Appellant paid to Respondent under protest the sum of $15,812.80, representing taxes and insurance so assessed against Appellant for a period beginning January 1, 1949, and ending June 30, 1955. (R. P. 28, f. 13; R. P. 29, f. 16; R. P. 29, f. 18). Thereafter and within the time allowed by statute, Appellant demanded refund of all sums so paid, and upon Respondent's failure to refund said payments, instituted an action in the Superior Court of Wake County, for the recovery of the payments made to Respondent on the 15th day of February, 1956. (R. P. 28, 29, f. 14; R. P. 30, f. 19; R. P. 23, f. 3).

The case was submitted to the Superior Court of Wake

County, North Carolina, on an agreed stipulation of facts, the parties having waived a jury trial. The Trial Court, finding as facts, all the facts that had been stipulated between the parties, entered judgment on the 30th day of October, 1957, in favor of the Respondent. (R. P. 31-32). The Court held that the taxes assessed and collected from the Appellant were lawful and properly assessed. This decision was affirmed by the North Carolina Supreme Court and hence this appeal.

HOW THE FEDERAL QUESTION IS PRESENTED

The Federal question involved herein was first raised by Appellant in its complaint wherein it asserted:

3. "The purpose of this suit is to recover $15,812.80 of alleged income tax unlawfully and wrongfully assessed against the plaintiff by the defendant and without authority and paid by the plaintiff to the defendant under duress and protest, together with interest thereon from the respective dates of payment, for which written demands for refunds have been made by plaintiff as required by law and refused by the defendant as hereinafter set forth, plaintiff claiming that it is not subject to or liable for said alleged taxes for the reason that the Statutes of North Carolina relied upon by defendant, properly construed, are not applicable to plaintiff, and in the alternative, that if said statutes are applicable on their face, they are unconstitutional and void as applied by plaintiff" because the statutes are violative of the Commerce Clause of the Federal Constitution and of the Due Process of Law Clause of Section 1 of the Fourteenth Amendment to the Federal Constitution. (R. P. 4-5).

Appellant then in Paragraph 4 of its complaint sum-

marized the statutes involved, and in Paragraph 13 of its complaint asserted:

> 13. "Plaintiff is advised, informed and verily believes it is not liable for the payment of the income taxes sought to be imposed upon and assessed against it by the defendant for that it has no principal office and is not domesticated in the State of North Carolina; all operations which it carries on in said state are solely and exclusively interstate business, which is authorized, permitted, supervised and directed under and within the jurisdiction of the Interstate Commerce Commission under and in accordance with the Federal Motor Carrier Act of Congress of 1935, and amendments thereto, and the Commerce Clause of the Federal Constitution, USCA, Title 49, Section 301, et seq.; that the State of North Carolina is without jurisdiction to assess upon and collect such taxes as proposed from the plaintiff on such business as it carries on in the State of North Carolina.
>
> "Plaintiff's first contention is that the statute which the defendant has applied to it for the imposition of said income taxes is not applicable to plaintiff, or its activities in North Carolina, under the facts of this case, for the reasons heretofore given.
>
> "Plaintiff's second contention, in the alternative, is that if said statute is applicable on its face, it is unconstitutional and void as applied to plaintiff because violative of both the Commerce Clause and the Due Process Clause of the Federal Constitution for the reasons hereinbefore set out.
>
> "Under the Due Process Clause the defendant is not authorized to tax extraterritorial values and the Commerce Clause invalidates said alleged income tax

as applied to Plaintiff which is a foreign corporation engaged within North Carolina exclusively in the interstate transportation of freight by motor truck but which is not authorized to do intrastate trucking in North Carolina and has never so engaged in that State."

Issue was joined on these allegations by the Respondent in its answer to the complaint. (R. P. 18-21).

The parties stipulated that the taxes which Respondent required Appellant to pay were levied pursuant to the statutes as pleaded in Appellant's complaint, and further stipulated the amount of such taxes paid, and that Appellant paid the same under protest and made due demand for refund. (R. P. 23).

The Trial Court, finding the facts to be as stipulated by the parties, found the following in its judgment:

". . . the Court, after hearing and considering the pleadings, stipulations of fact and argument of counsel, being of the opinion and concluding as a matter of law that the tax assessed and collected from the plaintiff, and which the plaintiff seeks to recover in this action, was lawfully and properly assessed and collected, and the plaintiff is, therefore, entitled to recover nothing of the defendant;" (R. P. 31).

The Federal questions involved were again raised in the appeal to the North Carolina Supreme Court by formal assignment of error. (R. P. 32). That Court affirmed the Trial Court's decision and specifically stated:

"In the light of the legislative intent, as well as carefully restricted impact of our Income Tax Act as

it is applicable to plaintiff, and by virtue of the authorities above set forth, we can only conclude, that the North Carolina statutes, under which the income taxes were imposed on plaintiff in the instant case, do not constitute a burden on interstate commerce, and do not violate the Commerce Clause of the Federal Constitution." 248 N. C. 560, at 574.

"In the collection of the income taxes from plaintiff in the instant case, we find no violation of 'the Due Process of Law' provision of the 14th Amendment to the Federal Constitution, and of 'the law of the land' provision of Art. 1, Sec. 17, of the North Carolina Constitution." 248 N. C. 560, at 577.

THE QUESTIONS ARE SUBSTANTIAL

A. COMMERCE CLAUSE QUESTION

Article 1, Section 8, Clause 3 of the Constitution of the United States, provides that Congress shall have the power

> "To regulate Commerce with foreign Nations, and among the several States and with the Indian Tribes."

The fundamental limitations on the taxing powers of the several states established by this Clause of the Constitution were judicially defined and delineated by this Court many years ago when it said:

> "In our opinion such a construction of the Constitution leads to the conclusion that no State has the right to lay a tax on interstate commerce in any form, whether by way of duties laid on the transportation of the subjects of that commerce, or on the receipts derived from that transportation, or on the occupation or business of carrying it on, and the reason is that

> such taxation is a burden on that commerce, and amounts to a regulation of it, which belongs solely to Congress." *Leloup* vs. *Port of Mobile*, 127 U. S. 640, 648 (1888).

This limitation exists without implementing legislation by Congress, and by its own force creates an area of nationwide commerce free from interference by the several cases.

This Court said in *Freeman* vs. *Hewit*, 329 U. S. 249, 252; 67 S. Ct. 274 (1946):

> "In short, the Commerce Clause, even without implementing legislation by Congress, is a limitation of the power of the states. (Citing cases). In so deciding, we reaffirmed, upon fullest consideration, the course of adjudication unbroken through the nation's history."

The statutes here in question impose a "tax equivalent to 6% of a proportion of its entire net income . . ." upon a foreign corporation doing business in North Carolina, provides that the total income of such corporation "shall be apportioned to North Carolina on the basis of the ratio of its gross receipts in this state . . . to its gross receipts . . . within and without the state, and that the words, 'gross receipts,' . . . shall be taken to mean and include the entire receipts for business done by such company."

Net income of the corporation is ascertained under the statute by taking gross "operating revenues" within the state and including in it the equal mileage proportion within the state of the corporation's "interstate business." From this is deducted the proportionate average of "operating expense."

The statute then provides that "the word, 'interstate business,' shall mean, as to transportation companies, operating revenue earned within the state by reason of the interstate transportation of persons or property into, out of or through this state. . ."

The Trial Court in this cause incorporated by reference the stipulation of facts by the parties. (R. P. 31). This stipulation included the facts that all of appellant's business in North Carolina is exclusively interstate in character; that it is not domesticated in North Carolina, and does not have and is not authorized to do intrastate business, and that the only freight delivered by it is that which either originates outside North Carolina or is destined outside that state. (R. P. 22; f. 1; R. P. 25, f. 5).

The North Carolina Supreme Court in its opinion stated:

> "The agreed stipulation of facts clearly shows that the taxes assessed and paid in the instant case were imposed on that part (Appellant's) of net income earned within North Carolina by reason of its interstate business. . ." (248 N. C. 560, 566).

Thus, it is clear that the North Carolina Supreme Court has upheld the validity of a taxing statute, which, by its terms and upon the conceded facts, imposes a tax upon that which is exclusively interstate commerce. This it does even though there is no intrastate business, and no local activity performed by Appellant. Such a tax has never before been imposed by a state with the approval of this Court.

This Court has, since the early days of our Republic, consistently upheld the basic premise of the Commerce Clause and has declared that state taxation could not prevent, interfere with or burden commerce between the sev-

eral states. *Brown* vs. *Maryland*, 12 Wheat. 419 (1827); *Robbins* v. *Shelby County Taxing District*, 120 U. S. 489, 7 S. Ct. 592 (1887); *Cheney Bros. Co.* v. *Massachusetts*, 246 U. S. 147, 38 S. Ct. 295 (1918); *Freeman* v. *Hewit*, 329 U. S. 249, 67 S. Ct. 274 (1946); *Nippert* v. *City of Richmond*, 327 U. S. 416, 66 S. Ct. 586 (1946); *Spector Motor Service, Inc.* v. *O'Connor*, 340 U.S. 602, 71 S. Ct. 508 (1951); *Alpha Portland Cement Co.* v. *Massachusetts*, 268 U. S. 203, 45 S. Ct. 477.

The North Carolina Supreme Court in the instant case sought to distinguish their holding from authoritative pronouncements of this Court by attaching the label of "net income tax" to the statutory imposition here involved as distinguished from "excise" or "privilege" taxes.

When the *Spector* case, supra, was before the Court of Appeals for the Second Circuit, that Court discussed the question of whether or not the issue was one of label or substance and stated:

> "The tax would certainly be the same under various other labels, such as a net income tax, a corporation business tax, or what not. The label as chosen seems obviously designed to express the purpose and the fair rationale behind the state's revenue program; it would be ironic were this to be held to defeat the tax as against, say, the cruder tax upheld in the Interstate Oil Pipe Line Co. case. If anything, the label here should be an aid, rather than a drawback, to its view in proper perspective."

This Court, in the same case, clearly stated that it was not dealing with a matter of label when it said:

> "The answer in the instant case has been made clear

> by the courts of Connecticut. It is not a matter of labels. The incidence of the tax provides the answer." (340 U. S. 602, 608).

The distinction sought to be made by the North Carolina Supreme Court was, as will be shown, an attempt to bring the case within the supposed limits of certain dicta contained in some cases decided by this Court, but there cannot be shown any realistic difference between a "net income tax" and a franchise tax measured by net income. There is no difference in its impact and effect and no difference in the procedure by which it is exacted. The sole and only distinction is a matter of label.

As stated by Justice Rutledge in *Interstate Oil Pipe Line Company* vs. *Stone*, 337 U. S. 662, 666, 69 S. Ct. 1264 (1949):

> ". . . we are concerned with the practical operation of challenged state tax statutes, not with their descriptive labels."

Except for the Spector case, this Court has never decided in any case the direct question of whether or not a state could lawfully impose a tax measured by net income on a business engaged solely and exclusively in interstate commerce.

This Court has, it is true, seemingly deviated at times from the basic limitations set forth in the early cases. Actually, this is not the case. Only in instances where this Court has found the activities or object of the tax to be local in nature and not a part of interstate commerce, *Memphis Natural Gas Company* vs. *Stone*, 335 U. S. 80, 68 S. Ct. 1475 (1948); or where a tax has been imposed either before interstate commerce begins or after it ends, *McGoldrick*

vs. *Berwine-White Coal Mining Company,* 309 U. S. 33, 60 S. Ct. 388 (1940); or, in some instances, where the tax has been upon certain of the instruments used in interstate commerce in lieu of an ad valorem property tax, *Great Northern Railway Company* vs. *State of Minnesota,* 270 U. S. 503, 49 S. Ct. 191 (1929), has this Court sustained a tax which may have had the appearance of one imposed upon interstate commerce. Also, it has permitted in some cases the inclusion of interstate proceeds, as well as intrastate proceeds, in measuring a tax where the object of the tax was intrastate or the privilege of carrying on such intrastate business. *International Harvester* vs. *Evatt,* 329 U. S. 416, 67 S. Ct. 444 (1947); *Memphis Natural Gas* vs. *Beeler,* 315 U. S. 649, 62 S. Ct. 857; *Atlantic Coastline R. Company* vs. *Daughton,* 262 U. S. 413, 43 S. Ct. 620.

In no case has the Court deviated from the principles established in the early cases that interstate commerce may not be subjected to state taxation.

In an early leading case in this field, the Court held repugnant to the Commerce Clause a tax which was essentially imposed upon the doing of interstate business.

In *Cheney Bros. Company* vs. *Commonwealth of Massachusetts,* 246 U. S. 147, 38 S. Ct. 295 (1918), the taxpayer was a Connecticut corporation engaged in the manufacturing and selling of silk fabrics. It maintained a selling office in Boston with one salesman located there and four others who traveled throughout the Eastern states. These salesmen solicited and took orders subject to the approval of the Connecticut office, and shipments of goods were made directly to purchasers. No collections were made in the Boston office and no stock of goods were kept there. No other business was done by it in Massachusetts. Massachusetts

imposed a tax on the corporation's net worth. This Court, in speaking of it, stated:

> "We do not perceive anything in this that can be regarded as a local business as distinguished from interstate commerce. The maintenance of the Boston office and the display therein of a supply of samples are in furtherance of the company's interstate business and have no other purpose. Like the employment of the salesmen, they are among the means by which that business is carried on and share its immunity from state taxation. * * * *We think the tax on this company was essentially a tax on doing an interstate business and therefore repugnant to the Commerce Clause.*" (Emphasis supplied)

In *Alpha Portland Cement Company* vs. *Mass.*, 268 U. S. 203, 45 S. Ct. 477 (1925), a Massachusetts excise tax based on the proportion of the company's assets employed in the state and the proportion of its net income derived in the state was held unconstitutional by this Court when applied to a New Jersey corporation engaged exclusively in interstate commerce. This Court said at Page 218:

> "The local business of a foreign corporation may support an excise measured in any reasonable way, if neither interstate commerce nor property beyond the state is taxed. *Underwood Typewriter Co.* v. *Chamberlain*, 254 U. S. 113, approved *such an excise measured by income reasonably attributed to intrastate business;* but nothing there said was intended to modify well-established principles. It must be read with the essential facts in mind. *Local business was a sufficient basis for the excise, and there was no taxation of interstate commerce or property beyond the State.* Of

course, the opinion does not support the suggestion that the present statute is free from the fatal objections to the former one because payment of the tax is no longer a condition precedent to carrying on any business." (Emphasis supplied)

The Court said further, at Page 219:

"The excise challenged by plaintiff in error is not materially different from the one declared unconstitutional in *Cheney Bros. Co.* v. *Massachusetts, and cannot be enforced against a foreign corporation which does nothing but interstate business within the state.* The introduction of an extremely complicated method for calculating the amount of the exaction does not change its nature or mitigate the burden." (Emphasis supplied)

More recently, this Court considered the case of *Spector Motor Service, Inc.* vs. *O'Connor*, 340 U. S. 602, 71 S. Ct. 508 (1951). In that case, this Court re-emphasized the principles of *Cheney* and *Alpha* and decided, beyond dispute, that a state tax upon income produced exclusively from interstate commerce is repugnant to the Commerce Clause. The taxpayer in that case operated a freight line which picked up freight in Connecticut for delivery outside that state and delivered freight into Connecticut from outside that state. Its terminal facilities and pickup service, comparable to the activities of Appellant in the instant case, were held to be integral parts of interstate commerce. It was found as a fact that taxpayer engaged in no intrastate activity. Connecticut imposed a tax which its highest court construed to be "an excise upon the franchises of corporations for the privilege of carrying on or doing business in the state" measured by net income reasonably attributable

to that state. That construction of the statute was accepted by this Court, and it was found that the method of allocation was reasonable and that the tax did not discriminate against interstate commerce. Upon these facts, the tax was held to be unconstitutional, and this Court said (Page 609-610):

> "This court heretofore has struck down, under the Commerce Clause, state taxes upon the privilege of carrying on a business that was exclusively interstate in character. The constitutional infirmity of such a tax persists no matter how fairly it is apportioned to business done within the state. Alpha Portland Cement Co. v. Massachusetts, 268 U. S. 203, 45 S. Ct. 477, 69 L. Ed. 916 (measured by percentages of 'corporate excess' and net income); Ozark Pipe Line Corp. v. Monier, 266 U. S. 555, 45 S. Ct. 184, 69 L. Ed. 439 (measured by percentage of capital stock and surplus). See Interstate Oil Pipe Line Co. v. Stone, 337 U. S. 662, 669, et seq., 69 S. Ct. 1264, 1267, 93 L. Ed. 1613 (dissenting opinion which discusses the issue on the assumption that the activities were interstate commerce); Joseph v. Carter and Weekes Stevedoring Co., 330 U. S. 422, 67 S. Ct. 815, 91 L. Ed. 993; Freeman v. Hewit, supra.
>
> "Our conclusion is not in conflict with the principle that, where a taxpayer is engaged both in intrastate and interstate commerce, a state may tax the privilege of carrying on intrastate business and, within reasonable limits, may compute the amount of the charge by applying the tax rate to a fair proportion of the taxpayer's business done within the state, including both interstate and intrastate. * * * * * *
>
> *"In this field there is not only reason but long-estab-*

lished precedent for keeping the federal privilege of carrying on exclusively interstate commerce free from state taxation. To do so gives lateral support to one of the cornerstones of our constitutional law. McCulloch v. Maryland, supra. (Emphasis supplied)

In 1954, this Court struck down an attempt by Virginia to impose a gross receipts tax on a business engaged exclusively in interstate commerce.

In *Railway Express Agency, Inc.* vs. *Virginia,* 347 U. S. 359, 74 S. Ct. 558 (1954), the Virginia gross income tax, as applied to Railway Express, whose activities were purely interstate, was drawn in question. This Court said (Page 367):

"It contends that this obvious burden on interstate commerce is validated by state protection of a localized incident in the course of the business. The three incidents are originating the interstate movement, which requires local pickup of the parcels; terminating the movement, which requires delivery, and movement through the State. If each of these incidents is sufficient warrant for taxing gross revenues from wholly interstate commerce, a concern doing a nationwide business is vulnerable to a gross-revenue tax in every one of the forty-eight states. But it is argued that this is permissible, provided the states formulate their burden so as each to burden it proportionately, not encroaching on the other's right to burden. *It is enough to say that we recently have ruled that local incidents such as gathering up or putting down interstate commodities as an integral part of their interstate movement are not adequate grounds for a state*

license, privilege or occupation tax." (Emphasis supplied)

Notwithstanding these positive landmark holdings, the North Carolina Supreme Court justified its holding in the instant case by relying upon certain language in *U. S. Glue Co.* vs. *Oak Creek,* 247 U. S. 321, 38 S. Ct. 499 (1918); *Wisconsin* vs. *Minn. Mining & Manufacturing Company,* 311 U. S. 452, 61 S. Ct. 253 (1940); *Underwood Typewriter Company* vs. *Chamberlain,* 254 U. S. 113, 41 S. Ct. 45 (1920); *Memphis Natural Gas Company* vs. *Stone,* 342 U. S. 389, 68 S. Ct. 1475 (1948); *Memphis Natural Gas* vs. *Beeler,* 315 U. S. 649, 62 S. Ct. 857 (1942); *McGoldrick* vs. *Berwine-White Coal Mining Company,* supra, and *Atlantic Coastline R. Co.* vs. *Daughton,* supra.

In the *U. S. Glue Company* case, supra, the taxpayer was a domestic corporation, with its principal manufacturing plant located in Wisconsin. The question was whether or not Wisconsin could tax the net income derived from sales negotiated, and, in some instances, effected outside that state. This Court upheld the tax. It should be noted that in that case, the taxpayer was a domestic corporation.

Furthermore, in the recent case of *Freeman* vs. *Hewit,* supra, this Court recognized that the taxing power there permitted was only applicable to residents of a state for it there stated at Page 255:

> "It can tax the privilege of resident in the state and measure the privilege by net income, including that derived from interstate commerce."

In so stating, this Court referred to the *U. S. Glue* case.

In the *Minnesota Mining and Manufacturing Company*

case, supra the taxpayer was engaged in many local activities, to which a privilege dividend tax could attach.

The North Carolina Supreme Court quotes also from the *Underwood Typewriter* case in support of its view that a tax measured by net profits is valid even though these profits are derived in part or mainly from interstate commerce, but the decision could not be construed to authorize a tax on business carried on solely in interstate commerce.

In the *Alpha* case, supra, this Court narrowly limited the Underwood holding, wherein it stated at Page 218:

> *"The local business of a foreign corporation may support an excise measured in any reasonable way,* if neither interstate commerce nor property beyond the state is taxed. Underwood Typewriter Co. v. Chamberlain, 254 U. S. 113, 65 L. Ed. 165, 41 Sup. Ct. Rep. 45, *approved such an excise measured by income reasonably attributed to intrastate business; but nothing there said was intended to modify well-established principles."*

In the *Memphis Natural Gas Company* case, the taxpayer again was engaged in local activities, and in reliance upon the *Beeler* case, the Supreme Court of North Carolina, though quoting the later limiting language used by this Court in the *Spector* case, as applied to *Beeler,* chose to misconstrue it. This Court had said in *Beeler* that even if the taxpayer's business was wholly interstate, the State of Tennessee could impose a non-discriminatory tax upon its net income without violating the Commerce Clause. This concededly was dicta. In a note to its opinion in the Spector case, this Court said:

> "Any suggestion in that opinion as to the possible

validity of such a tax, if applied to earnings derived wholly from interstate commerce, is not essential to the decision in the case."

This much, the North Carolina Supreme Court quoted, but went on to say that the taxes in the present case were not imposed "on its *whole income* derived from interstate commerce but only on that part of its net income earnings within the State of North Carolina. . ." (248 N. C. 560, 572). Apparently, that Court did not choose to read the language contained in the note to the Spector case in such a way to gain its plain and indisputable meaning. The question was not whether the tax was imposed upon its *whole income* but upon any income derived *wholly* from interstate commerce.

Again, the North Carolina Supreme Court's reliance upon the *McGoldrick* case is misplaced notwithstanding the language quoted by it to the effect that a tax could be levied on net income wholly derived from interstate commerce. The tax imposed in that case was upon the transfer of possession of property at the end of its interstate journey. In upholding the statute in the McGoldrick case, this Court cited in support the U. S. Glue Company and Underwood cases and Atlantic Coastline Railroad Company vs. Daughton, supra, and *Matson Navigation Company* vs. *State Board*, 297 U.S. 441, 56 S. Ct. 553 (1936). As has been shown, the U. S. Glue Company and Underwood cases are readily distinguishable and their holdings have been greatly limited. And as pointed out by the North Carolina Supreme Court itself, the tax imposed in the *Daughton* case was upon a taxpayer concededly engaged in intrastate activities.

The effect of this holding of the North Carolina Supreme Court in this case would be, beyond doubt, discouraging to

interstate truckers wishing to do business in that state and an impediment to the free flow of commerce across its borders. The obvious deterrent to one taxpayer, however, is but a small part of the disaster which would follow in the wake of such a decision. Should such laws be held valid, other states would be encouraged to reap rewards under tax statutes from the great flow of interstate commerce. Already, the highest courts of many states are being faced with deciding substantially identical issues.

Louisiana[3] and Minnesota[3] already have upheld their Legislatures in tapping this area of revenue. The highest courts of Pennsylvania[4] and Georgia[5] have declared similar attempts in their states to be inimical to the orderly flow of commerce and repugnant to the Federal Constitution.

Editorial comment has appeared concerning all of these holdings. The probability that other states would embark upon similar schemes to the great detriment of national commerce has been foreseen. Reminiscent of the fears that plagued the framers of our Constitution are the fears that chaos might soon result if such statutes are allowed to stand. One such prediction appears in relation to the case now under consideration.

A legal publisher, in its state and local tax bulletin of

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[3] Louisiana. *Fontenot* vs. *John I. Hay Co.*, 228 La. 1031 84 S. 2d 810 (1955)

[3] Minnesota. *State* vs. *Northwestern States Portland Cement Co.*, —— Minn. ——, 84 N. W. 2d 373, Probable jurisdiction noted. 355 U. S. 911, 2 L. Ed. 2d 272, No. 606.

[4] Pennsylvania. *Commonwealth* vs. *Eastman Kodak*, 385 Pa. 607, 124 A. 2d 100 (1956)

[5] Georgia. *Stockham Valves and Fitting, Inc.* vs. *T. V. Williams, State Revenue Commissioner*, 213 Ga. 713, 101 S. E. 2d 197. Certiorari granted, March 17, 1958, 356 U. S. 911, 2 L. Ed. 2d 585.

July 22, 1958, referring to the present case, had the following to say concerning the possible results:

> "FANTASTIC RESULTS—At stake is not only an incalculable future burden on all cross-state activities, but a corresponding one on the Courts themselves. If 5 out of 9 federal high court justices go along with North Carolina, in one stroke all existing landmarks, all known tests of interstate tax immunity will be wiped out completely. There will be no basis, no predictable way to draw the thin though decisive interstate line once respected by the federal bench. Every state will have an unassailable tax claim on every penny of net income *derived in any way from sources within its borders.* The progressive multiple effects of future and back assessments are simply inconceivable. To the extent that any individual, association or corporation anywhere in the United States has tapped the markets of any state it will be accountable taxwise to that state. This will call for a veritable flood of returns, assessments, and payments in the wake of every dollar of business drawn from each state. Because of the nonuniformity of allocation and apportionment procedures in the various states, every business man will be subject to a very real burden of accounting for multiple levies, frequently on well over 100% of his income spread among the contacted states. Every 'minimum contact' with a state will be scrutinized. The slightest vestige of property, personnel (even those casually or occasionally employed), and the most fleeting, tenuous or insubstantial act or communication may supply a tax link if part of regular business. The tax target will take in every local advertising lead, directory listing and personal visitation—as well as written, telegraphic, telephonic, electronic, and other medium of contact,

> productive of any business or receipts in any way tapping the markets of a state by interstate means. A road to large-scale tax-induced bankruptcy. Fantastic? What is to prevent it?" (Emphasis by the author). *P-H, STATE & LOCAL TAXES*, Report Bulletin No. 3, Par. 3.1, July 22, 1958.

Because the holding in the instant case departs from the rule of such long standing, and that the result of such a decision will greatly affect and curtail the orderly flow of commerce, the question here involved should be determined by this Court.

B. DUE PROCESS QUESTION

The North Carolina Supreme Court upheld the tax statute here in question on the grounds that Appellant engaged in income-producing activities in this state (248 N. C. 560, 575). Its justification for this theory of taxation on a foreign corporation engaged exclusively in interstate commerce was, in substance, that North Carolina provided a civilized community in which such activities could flourish, and that that state provided protection which no other state could give to appellant.

It is true that this Court has decided cases enunciating the principle that "that test is whether the property was taken without due process of law, or, if paraphrase we must, whether the taxing power asserted by the state bears fiscal relation to protection, opportunities, and benefits given by the state. The simple but controlling question is whether the state has given anything for which it can ask return." *State of Wisconsin* vs. *J. C. Penney*, 311 U. S. 435, 444; 61 S. Ct. 246, 250 (1940)."

It is also true, as pointed out by the North Carolina Su-

preme Court, that this Court, in the case of *Ott* vs. *Mississippi Valley Barge Line Company*, 336 U. S. 169; 69 S. Ct. 432 (1949), upheld the imposition of ad valorem property taxes on the taxpayer, a barge line company whose barges passed in and out of the taxing state, but the tax here in question is assessed, not as an ad valorem property as in the *Ott* case, nor in lieu of an ad valorem property tax as was in the case of *Great Northern Railway Company* vs. *Minnesota, supra*. The tax is in addition to property, gasoline, license, unemployment and intangible property taxes.

As pointed out recently by this Court in *Miller Brothers* vs. *Maryland*, 347 U. S. 304; 74 S. Ct. 535 (1954): "Due process requires some definite link, some minimum connection, between a state and the person, property or transaction it seeks to tax." In the case at bar, there are no intrastate incidents which would enable North Carolina constitutionally to impose such taxes. Appellant's home state is Delaware, and its principal office is in Tennessee. It has neither asked for nor obtained permission from the State of North Carolina to carry on its activities; such permission was not needed. It has chosen to confine itself solely to interstate activity. There is no event upon which this tax can rest without being repugnant to due process.

In the Miller Brothers case, the Appellant, in addition to soliciting business by various media of advertising which reached the State of Maryland, also delivered articles of sale from its home in the State of Delaware into the State of Maryland. Maryland attempted to exact a use tax on sales made in Delaware reaching the State of Maryland. It attached one truck of the Appellant while the truck was delivering the goods in Maryland. This Court held that the State of Maryland could not impose such a use tax without denial of due process.

As in the Miller case, a definite link is absent in this case. The record fails to disclose a minimum connection upon which the State of North Carolina can base its power and impose the tax in question. Absent this, due process is denied.

CONCLUSION

For the reasons stated, the questions presented by this appeal are substantial, and are of importance to the Appellant, to the commerce of our nation, and to the public in general. It is respectfully submitted that probable jurisdiction should be noted.

Respectfully submitted,

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APPENDIX "A"

SUPREME COURT OF NORTH CAROLINA
SPRING TERM 1958

No. 451—Wake

ET&WNC TRANSPORTATION COMPANY,
a corporation,

v.

JAMES S. CURRIE, Commissioner of
Revenue of the State of North Carolina.

Appeal by plaintiff from Hall, J., October 1957 Regular Civil Term of Wake.

Civil action against the Commissioner of Revenue of the State of North Carolina to recover taxes paid under protest.

The action was heard upon an agreed stipulation of facts, the parties by their attorneys having in writing waived a jury trial. A summary of the agreed stipulation of facts follows:

One. Plaintiff, a Delaware corporation, with its principal office in Johnson City, Tennessee, is a common carrier of freight for compensation by motor vehicles in interstate commerce only between the States of North Carolina, South Carolina, Virginia, Georgia and Tennessee, except that in the State of Tennessee it also engages in intrastate business. All of its interstate business is authorized, permitted, supervised and directed under the jurisdiction of the Interstate Commerce Commission in accordance with the Federal Motor Carrier Act of the Congress of 1935, and amendments thereto (S. C. A., Title 49, Sec. 301 et seq.), and the Com-

merce Clause of the Federal Constitution (U. S. Const., Art. I, sec. 8 (3)). Its intrastate business in Tennessee is under the jurisdiction of the Tennessee Public Service Commission. It has no offices in North Carolina, except such as are incident to its motor freight terminals, which are necessary for its interstate operations in this State. It has never been domesticated in North Carolina. It has never been authorized by North Carolina to do intrastate business. All of its business in North Carolina is now, and always has been, exclusively interstate in character.

Two. The purpose of the action is to recover from the defendant income taxes in the sum of $15,812.80 paid to the State of North Carolina under protest by plaintiff.

Three. The income taxes, which the defendant required the plaintiff to pay, were levied pursuant to the provisions of G. S., Ch. 105, Art. 4, and in particular Sections 105-134 and 105-136 of said chapter and article.

Four. Plaintiff owns no real estate in North Carolina, but rents and maintains freight terminals in various places in the State solely for its interstate operations. These terminals are manned by employees of plaintiff, who usually live in the State, and whose duties pertain only to its interstate activities. Plaintiff hauls into North Carolina interstate freight only by its interstate motor vehicles. Plaintiff owns no personal property in North Carolina, except pickup and delivery trucks, together with furniture, fixtures and equipment necessary for its terminals. These pickup and delivery trucks are licensed in North Carolina. When freight is received at its various terminals in the State, it is delivered to the consignees, either direct from the interstate motor vehicles, or in delivery trucks stationed at the respective terminals. Its delivery trucks pick up interstate freight from its customers destined for or consigned to points or

parties outside of North Carolina, and take it to its terminals. There such freight is billed and loaded into its interstate trucks, and transported to destinations outside of North Carolina. Usually when a full truckload of freight is shipped to or from any customer in North Carolina, its interstate trucks go to the customer's place of business. Sometimes such truckloads go by the terminals when it is too late to deliver the freight at night, or to get started, or when a Sunday or a holiday intervenes. In the case of less than truckload shipments, its pickup trucks gather freight from its customers for assembly into full truckloads at its various terminals in the State. These pickup trucks act as a part of its interstate shipments of freight. Plaintiff does not handle any purely intrastate shipments of freight in North Carolina. The only freight plaintiff handles is that which either originates outside of North Carolina, or is destined outside of the State.

Five. During its fiscal year from 1 July 1954 to 30 June 1955, plaintiff paid rentals on its terminals in North Carolina in the amount of $21,911.00. During its same fiscal year, it paid in North Carolina the following taxes:

Gasoline Taxes	$38,868.00
Truck License Taxes	6,294.00
Personal Property Taxes	394.00
N. C. Unemployment Taxes	3,338.00
Intangible Property Taxes	60.00
Total Taxes Paid in North Carolina	$48,954.00

During the same fiscal year, plaintiff paid substantial rentals and taxes in other states in which it operated, except in the State of Virginia. During its fiscal years ending 30 June 1955 and 30 June 1956, the interstate motor vehicles

which plaintiff operated were largely based and taxed in Tennessee, and used Tennessee license plates in its operations under reciprocal agreements between Tennessee and the other states in which it operated, by which the interstate motor vehicles are to be taxed and licensed in the carrier's domicile or principal place of business. Under the reciprocal agreement between North Carolina and Tennessee, plaintiff, for its fiscal year ending 30 June 1955, paid license plate taxes to Tennessee for its interstate motor vehicles in the sum of $71,886.38. During its fiscal year from 1 July 1955 to 30 June 1956, plaintiff paid the same rentals on its terminals in North Carolina, and substantially the same amount of taxes in North Carolina, as it did during its preceding fiscal year, and also paid substantial rentals and taxes in other states in which it operated, except Virginia, and license plate taxes to Tennessee on its interstate trucks in the amount of $78,589.00.

Six. On 31 August 1954 defendant requested in writing that plaintiff furnish him certain information, and explain why it had not filed state income tax returns. On 9 September 1954 plaintiff furnished in writing the information requested, and stated it was not subject to income tax to North Carolina. On 7 October 1954 defendant wrote plaintiff that as Commissioner of Revenue of the State of North Carolina he proposed to assess and levy a tax upon its income pursuant to G. S., Ch. 105, and demanded that it furnish him from its books and records information whereby the amount of such tax might be determined.

Seven. On 3 January 1955, at plaintiff's request, a hearing was held in defendant's office, at which plaintiff presented evidence, and contended it was not subject to the payment of income tax to North Carolina. On 17 June 1955

defendant rendered a decision directing plaintiff to file state income tax returns.

Eight. On 28 June 1955 plaintiff filed state income tax returns for the years ending 30 June 1950 through 30 June 1954.

Nine. On 29 June 1955 defendant made an assessment against the plaintiff for state income tax as follows:

Year ending 30 June 1950	$4,265.23
Year ending 30 June 1951	3,706.09
Year ending 30 June 1952	1,735.20
Year ending 30 June 1953	3,872.89
Year ending 30 June 1954	890.44

Defendant by letter notified plaintiff of this assessment.

Ten. On 5 July 1955 plaintiff paid under protest to defendant the taxes set forth in paragraph nine.

Eleven. On 25 July 1955 plaintiff made a demand in writing upon defendant for a refund of the above taxes paid, with interest thereon, but defendant refuses to make a refund.

Twelve. On 19 July 1955 defendant made a further assessment against plaintiff for state income tax in the amount of $1,045.86 for a period of time from 1 January 1949 to 30 June 1949. Plaintiff paid defendant this tax under protest, and defendant refuses its demand to refund it.

Thirteen. On 23 September 1955 defendant made a further assessment against plaintiff for state income tax for its fiscal year ending 30 June 1955 in the amount of $295.00. Plaintiff paid defendant this tax under protest, and defendant refuses its demand to refund it.

Judge Hall, after considering the stipulation of facts and

arguments of counsel, being of the opinion that the taxes assessed by the defendant, and paid by plaintiff under protest were properly assessed and collected, rendered judgment that the plaintiff recover nothing from the defendant, and be taxed with the costs.

From the judgment plaintiff appeals.

HARKINS, VAN WINKLE, WALTON & BUCK AND COX, EPPS, POWELL & WELLER for Plaintiff, Appellant.

GEORGE B. PATTON, ATTORNEY GENERAL, and BASIL L. SHERRILL, Asst. Attorney General, for Defendant, Appellee.

PARKER, J. Plaintiff has adopted the proper procedure to have determined the validity of the taxes assessed against it, which it paid. G. S. 105-267; *Buchan v. Shaw*, Comr. of Revenue, 238 N. C. 522, 78 S. E. 2d 317.

According to the agreed stipulation of facts, the taxes, which are the subject of this suit, were imposed and collected under the provisions of G. S. 105-134 and G. S. 105-136, which sections appear under Chapter 105 of the General Statutes, Article 4, "Schedule D. Income Taxes", as said sections were in full force and effect prior to the amendments and supplements to The Revenue Act enacted at the 1957 Session of the General Assembly, Session Laws of North Carolina 1957, Chapter 1340.

Chapter 105 of the General Statutes is designated "Taxation." Of this Chapter, Article I, is designated "Schedule A. Inheritance Tax"; Article 2, "Schedule B. License Taxes"; Article 3, "Schedule C. Franchise Tax"; Article 4, "Schedule D. Income Tax"; Article 5, "Schedule E. Sales Tax"; Article 6, "Schedule G. Gift Taxes"; Article 7, "Schedule H. Intangible Personal Property."

While the towns, cities and counties in North Carolina impose ad valorem taxes on real and personal property of individuals, firms and corporations, the State of North Carolina does not.

The general purpose of Chapter 105, Article 4, "Schedule D. Income tax," is expressed in G. S. 105-131, as follows: "To impose a tax for the use of the State government upon the net income in excess of the exemption herein allowed. . . (a) of every resident of the State; (b) of every domestic corporation; (c) of every foreign corporation and of every nonresident individual having a business or agency in this State or income from property owned, and from every business, trade, profession or occupation carried on in this State."

G. S. 105-134, II. Foreign Corporations, provides: "Every foreign corporation doing business in this State shall pay annually an income tax equivalent to six per cent of a proportion of its entire net income, to be determined according to the following rules." The rule followed by the defendant here is set forth in paragraph 3 of G. S. 105-134, and provides that "the total income of such corporation shall be apportioned to North Carolina on the basis of the ratio of its gross receipts in this state during the income year to its gross receipts for such year within and without the State," and G. S. 105-134, 3, (a), further provides that "the words 'gross receipts' as used in this subsection shall be taken to mean and include the entire receipts for business done by such company."

G. S. 105-136 provides a basis for ascertaining the net income of every corporation engaged in the business of operating a steam, electric railroad, express service, telephone or telegraph business, or other form of public service, when such company is required by the Interstate Commerce

Commission to keep records according to its standard classification of accounting. This statute further provides how the net revenue within this state of such a corporation from operations shall be ascertained, when the business of such a corporation is in part within and in part without the State. It also provides that from the net operating income thus ascertained shall be deducted uncollectible revenue, and taxes paid in this State for the income year other than income taxes. G. S. 105-136 further provides; "For the purposes of this section the words 'interstate business' shall mean, as to transportation companies, operating revenue earned within the State by reason of the interstate transportation of persons or property into, out of, or through this state. . . ."

The appellant makes no contention that the amounts of the income taxes assessed against it, which it paid, are incorrect. It contends that these income taxes were not lawfully assessed and collected from it on two grounds. One. The statutes under which these income taxes were assessed and collected from it constitute a burden on interstate commerce, and violate the Commerce Clause of the Federal Constitution. Two. The collection of such income taxes violates the due process phrase of the 14th amendment to the Federal Constitution, and also Art. I, Section 17, of the North Carolina Constitution.

Chapter 105, Article 3, is designated "Schedule C. Franchise Tax." Section 105-114 of this article explicitly states the nature of this tax: "The taxes levied in this article upon persons and partnerships are for the privilege of engaging in business or doing the act named. The taxes levied in this article upon corporations are privilege or excise taxes levied upon: . . . (a) corporations not organized under the laws of this State for doing business in this State and for the benefit and protection which such corporations receive from

the government and laws of this State in doing business in this State."

A comparison of Chapter 105, Article 3. "Schedule C. Franchise Tax," and Chapter 105, Article 4, "Schedule D, Income Tax" indicates a clear legislative intent to differentiate between these two types of taxes, for a clear distinction has been made by the General Assembly of this State between an excise tax imposed on domestic and foreign corporations for the privilege of transacting business within the State, and an income tax on net corporate income, which is based on a past fact of earned net profits. The agreed stipulation of facts clearly shows that the taxes assessed and paid in the instant case were imposed on that part of plaintiff's net income earned within North Carolina by reason of its interstate business, and fairly attributable to its interstate business done or performed within the borders of the State of North Carolina. The statutes under which these taxes were assessed against plaintiff in precise words preclude a contentoin that it was the legislative intent that the taxes assessed and paid here were excise or privilege taxes.

When we consider a claim of immunity from taxation, we must come to grips with realities, not shadows. The taxes assessed and collected in the instant case are not in form nor in substance taxes on interstate commerce; nor are they taxes on gross income, nor are they franchise taxes. The taxes here assessed at a non-discriminatory rate, and paid, were imposed upon that part of plaintiff's net income earned within North Carolina by reason of its interstate business, and reasonably attributable to its interstate business done or performed within the borders of the State of North Carolina. If plaintiff should have no net income earned within North Carolina by reason of its interstate business, and

reasonably attributable to its interstate business done or performed within the borders of the State of North Carolina, it could not be required to pay income tax to the State of North Carolina.

In discussing the Commerce Clause of the Federal Constitution, Article I, section 8, (3), we deem this language in *Freeman* v. *Hewit*, 329 U. S. 249, 91 L. Ed. 265, pertinent: "The power of the States to tax and the limitations upon that power imposed by the Commerce Clause have necessitated a long, continuous process of judicial adjustment. The need for such adjustment is inherent in a federal government like ours, where the same transaction has aspects that may concern the interests and involve the authority of both the central government and the constituent states. The history of this problem is spread over hundreds of volumes of our Reports. To attempt to harmonize all that has been said in the past would neither clarify what has gone before nor guide the future. Suffice it to say that especially in this field opinions must be read in the setting of the particular cases and as the product of pre-occupation with their special facts."

In considering the question before us for decision, we must remember that when Chief Justice Marshall presided over the United States Supreme Court, there was no such thing in this nation as an income tax.

We find this language in *U. S. Glue Co.* v. *Town of Oak Creek*, 247, U. S. 321, 62 L. Ed. 1135: ". . . in *Peck & Co.* v. *Lowe*, (decided May 20th last) 247 U. S. 165, 38 Sup. Ct. Rep. 432, (62 L. Ed. 1049), we held that the Income Tax Act of October 3, 1913, chap. 16 . . . , when carried into effect by imposing an assessment upon the entire net income of a corporation, approximately three-fourths of which was derived from the export of goods to foreign countries, did

not amount to laying a tax or duty on articles exported within the meaning of Article I, section 9, cl. 5 of the Constitution. The distinction between a direct and an indirect burden by way of tax or duty was developed, and it was shown that an income tax laid generally on net incomes, not on income from exportation because of its source or in the way of discrimination, but just as it was laid on other income, and affecting only the net receipts from exportation after all expenses were paid and losses adjusted and the recipient of the income was free to use it as he chose, was only an indirect burden. . . . A tax upon the net profits has not the same deterrent effect, since it does not arise at all unless a gain is shown over and above expenses and losses, and the tax cannot be heavy unless the profits are large. Such a tax, when imposed upon net incomes from whatever source arising, is but a method of distributing the cost of government, like a tax upon property, or upon franchises treated as property; and if there be no discrimination against interstate commerce, either in the admeasurement of the tax or in the means adopted for enforcing it, it constitutes one of the ordinary and general burdens of government, from which persons and corporations otherwise subject to the jurisdiction of the States are not exempted by the Federal Constitution because they happen to be engaged in commerce among the States."

In *Graves* v. *New York*, 306 U. S. 466, 83 L. Ed. 927, 120 A. L. R. 1466, it was held that the imposition by the State of New York of a nondiscriminatory income tax on the salary of plaintiff, an employee of the Home Owners' Loan Corporation, an instrumentality of the Federal Government, did not place an unconstitutional burden on the Federal Government, where Congress has not conferred on the salaries of such instrumentality an immunity from state

taxation. The Court said: "And when the national government lawfully acts through a corporation which it owns and controls, those activities are governmental functions entitled to whatever tax immunity attaches to those functions when carried on by the government itself through its departments . . . . The present tax is a nondiscriminatory tax on income applied to salaries at a specified rate. It is not in form or substance a tax upon the Home Owners' Loan Corporation or its property or income, nor is it paid by the corporation or the government from their funds. It is measured by income which becomes the property of the tax payer when received as compensation for his services; and the tax laid upon the privilege of receiving it is paid from his private funds and not from the funds of the government, either directly or indirectly. The theory, which once won a qualified approval, that a tax on income is legally or economically a tax on its source, is no longer tenable." The Court's opinion closes with these words: "The immunity is not one to be implied from the Constitution, because if allowed it would impose to an inadmissible extent a restriction on the taxing power which the Constitution has reserved to the state governments." See *Soltero* v. *Descartes,* 192 Fed. 2d 755.

Plaintiff relies upon *Spector Motor Service, Inc.* v. *O'Connor,* 340 U. S. 602, 95 L. Ed. 573. The basis of the decision in that case was not the fact that the foreign corporation was solely engaged in interstate commerce, but was that tax, measured by the net income received from business transactions within the State of Connecticut, which tax as construed by the Connecticut Court, attached solely to the franchise of petitioner to do interstate business, even though it be fairly apportioned and nondiscriminatory, may not be imposed on the privilege of engaging in business in Con-

necticut that is exclusively interstate in nature. The Connecticut Supreme Court, *Spector Motor Service* v. *Walsh,* 135 Conn. 37, 61 A. 2d 89, construed its statute as "a tax or excise upon the franchise of corporations for the privilege of carrying on or doing business in the state, whether they be domestic or foreign." The United States Supreme Court manifestly accepted this construction by the Supreme Court of Connecticut as controlling its interpretation of the state statute. In *Memphis Natural Gas Co.* v. *Stone,* 335 U. S. 80, 92 L. Ed. 1832, the Court said: "As we are bound by the construction of the state statute by the state court, it is idle to suggest that the tax is on 'the privilege of engaging in interstate business.' " Since the tax imposed in the Spector case was for the *privilege* of engaging in interstate commerce, it violated the Commerce Clause of the Federal Constitution.

The Court in the majority opinion in the Spector case pointed out that "the question whether a state may validly make interstate commerce pay its way depends first of all upon the constitutional channel through which it attempts to do so." The Court further on in the majority opinion uses this significant language: "The State is not precluded from imposing taxes upon other activities or aspects of this business which, unlike the privilege of doing interstate business, are subject to the sovereign power of the State. Those taxes may be imposed although their payment may come out of the funds derived from petitioner's interstate business, provided the taxes are so imposed that their burden will be reasonably related to the powers of the State and nondiscriminatory."

The language of the United States Supreme Court in the Spector case shows that the tax imposed in that case is entirely different from the tax imposed in the instant case.

The incidence of the present tax is that part of plaintiff's net income earned within North Carolina by reason of its interstate business, and reasonably attributable to its interstate business done or performable within the borders of North Carolina, and not upon the franchise of plaintiff to engage in interstate business in North Carolina.

Defendant further relies on *Railway Express Agency, Inc.* v. *Virginia*, 347 U. S. 359, 98 L. Ed. 757, and quotes this part of the majority opinion: "It is enough to say that we recently have ruled that local incidents such as gathering up or putting down interstate commodities as an integral part of their interstate movement are not adequate grounds for a state license, privilege or occupation tax." That case is distinguishable from the instant case, in that it involved a privilege tax and the formula imposed for assessment. It does not mention income taxes, nor does it abandon the local incident theory. Almost the closing words of the majority opinion are: "We think we can only regard this tax as being in fact and effect just what the Legislature said it was—a privilege tax, and one that cannot be applied to an exclusively interstate business." In addition, plaintiff's business in North Carolina, as shown by the agreed stipulation of facts, is more than the gathering up or putting down interstate commodities.

Plaintiff also relies upon the relatively recent case of *Com. of Pennsylvania* v. *Eastman Kodak Co.*, 385 Pa. 607, 124 A. 2d 100. That case is distinguishable. The Court said: "Notwithstanding the fact that the Act seeks to impose what it calls a property tax, it is clear that the tax, at least as far as the present defendant is concerned, is an excise tax for the privilege of doing business in Pennsylvania."

As stated in the Spector case in the United States Su-

preme Court, that Court has consistently struck down, under the Commerce Clause of the Federal Constitution, state taxes upon the privilege of carrying on a business that is exclusively interstate in character.

In *Wisconsin* v. *Minnesota Min. & Mfg. Co.*, 311 U. S. 452, 85 L. Ed. 274, the majority opinion said "The Commerce Clause is invoked. But it is too late in the day to find offense to that Clause because a state tax is imposed on corporate net income of an interstate enterprise which is attributable to earnings within the taxing state, *Matson Nav. Co.* v. *State Bd. of Equilization*, 297 U. S. 441, 80 L. Ed. 791." Four judges dissented for the reason stated in the dissenting opinion in *Wisconsin* v. *J. C. Penney Co.*, 311 U. S. 435, 85 L. Ed. 267, 130 A. L. R. 1229. The dissenting opinion in the Penney case, written by Mr. Justice Roberts, was based in part on the fact that the tax exacted was not called an income tax, and had been "held by the highest court of Wisconsin not to be an income tax but an excise upon a privilege." The dissenting opinion has this statement: "The respondent admittedly received income in Wisconsin. No one questions the power of Wisconsin to lay a tax upon the receipt of that income." The majority opinion in the Wisconsin v. Penney case says: "For many years, corporations chartered by other states but permitted to carry on business in Wisconsin have been subject to a general corporate income tax act on earnings attributable to their Wisconsin activities. The state has, of course, power to impose such a tax. *United States Glue Co.* v. *Oak Creek*, 247 U. S. 321, 62 L. Ed. 1135, 38 S. Ct. 499, Ann. Cas. 1918E 749; *Underwood Typewriter Co.* v. *Chamberlain*, 254 U. S. 113, 65 L. Ed. 165, 41 S. Ct. 45."

In *Underwood Typewriter Co.* v. *Chamberlain*, 254 U. S. 113, 65 L. Ed. 165, the Court said: "This tax is based upon

the net profits earned within the state. That a tax measured by net profits is valid, although these profits may have been derived in part, or indeed mainly, from interstate commerce, is settled."

In *Memphis Natural Gas Co.* v. *Stone, supra,* the State of Mississippi imposed a state franchise tax measured by the value of capital used, invested or employed in the State, upon a pipeline company, a part of whose pipeline passes through the State but which does no intrastate business and has never qualified therefor under the laws of the State. The Memphis Natural Gas Company is a Delaware corporation which owns and operates a pipeline for the transportation of natural gas. The line runs from the Monroe Gas Field in the State of Louisiana through the States of Arkansas and Mississippi to Memphis and other points in the State of Tennessee. Approximately 135 miles of the pipeline lie within Mississippi; at two points within that State there are compressing stations. It was stipulated that the Gas Company has never engaged in any intrastate commerce in Mississippi; that it has only one customer within the State, the Mississippi Power and Light Company, to which it sells gas from its interstate line at wholesale from several delivery points; that the Gas Company has never qualified under the laws of Mississippi to do intrastate business within that State; that it has no agent for the service of process and that it has no office within the State; and that its only employees and representatives in Mississippi are those necessary to maintain the pipeline and its auxiliary appurtenances. The Gas Company has paid all ad valorem taxes assessed against its property in Mississippi pursuant to the State law. The Supreme Court of The State of Mississippi in 201 Miss. 670, 29 So. 2d 268, approved the imposition of the tax and construed the state tax as "an exaction . . . as a recompense for . . . protection of . . . the local activities in

maintaining, keeping in repair, and otherwise in manning the facilities of the system throughout the 135 miles of its line in this State." The attack on the Mississippi statute was that it violated the Commerce Clause of the Federal Constitution by putting a tax on the commerce itself. The Court's opinion, after reviewing many of its prior decisions, and after citing in a note to its opinion its cases in which local incidents formed a sound basis for taxation by a State of a foreign corporation doing interstate business, affirmed the decision of the Supreme Court of Mississippi, and closed its opinion with these words: "The Mississippi excise has no more effect upon the commerce than any of the instances just recited. The events giving rise to this tax were no more essential to the interstate commerce than those just mentioned or ad valorem taxes. We think that the state is within its constitutional rights in exacting compensation under this statute for the protection it affords the activities within its borders. Of course, the interstate commerce could not be conducted without these local activities. But that fact is not conclusive. These are events apart from the flow of commerce. This is a tax on activities for which the state, not the United States, gives protection and the state is entitled to compensation when its tax cannot be said to be an unreasonable burden or a toll on the interstate business."

In *Memphis Natural Gas Co.* v. *Beeler*, 315 U. S. 649, 86 L. Ed. 1090, Chief Justice Stone, speaking for the Court, said: "In any case, even if taxpayer's business were wholly interstate commerce, a nondiscriminatory tax by Tennessee upon the net income of a foreign corporation having a commercial domicile there, . . . , or upon net income derived from within the state, citing numerous cases, is not prohibited by the commerce clause on which alone taxpayer relies. Many cases are cited." In a note to the opinion of the United States Supreme Court in the Spector case, it is said that

"any suggestion in that opinion (the Beller case) as to the possible validity of such a tax if applied to earnings derived *wholly* from interstate commerce is not essential to the decision in the case." (Emphasis ours). In the instant case the income taxes imposed on plaintiff were not on its *whole income* derived from interstate commerce, but only on that part of its net income earned within the State of North Carolina by reason of its interstate business, and reasonably attributable to its interstate business done or performed within the borders of the State of North Carolina.

In *McGoldrick* v. *Berwind-White Coal Min. Co.*, 309 U. S. 33, 84 L. Ed. 565, 128 A. L. R. 876, the Court said: "But it was not the purpose of the commerce clause to relieve those engaged in interstate commerce of their just share of state tax burdens, merely because an incidental or consequential effect of the tax is an increase in the cost of doing the business. Citing authority. Not all state taxation is to be condemned because, in some manner, it has an effect upon commerce between the states, and there are many forms of tax whose burdens, when distributed through the play of economic forces, affect interstate commerce, which nevertheless fall short of the regulation of the commerce which the Constitution leaves to Congress. A tax may be levied on net income wholly derived from interstate commerce."

Atlantic Coast Line R. Co. v. *Daughton, Norfolk Southern R. Co.* v. *Daughton, Seaboard Air Line R. Co.* v. *Daughton, Southern R. Co.* v. *Daughton*, 262 U. S. 413, 67 L. Ed. 1051, were appeals by complainants from decrees of the District Court of the United States for the Eastern District of North Carolina, dismissing the bills filed to enjoin the enforcement of an income tax by the State of North Carolina. The applicable income tax law in

North Carolina at that time, as stated in the opinion, was as follows: "The Constitution of North Carolina (art. 5, sec. 3, as amended January 7, 1921) authorizes the general assembly to tax incomes at a rate not exceeding 6 per cent. The Income Tax Act of March 8, 1921 (Revenue Act, chap. 34, Schedule D, sections 100-904, as amended by chap. 35, Public Laws 1921), laid upon corporations a tax equal to 3 per cent of the entire net income as therein defined, and upon individuals a progressive tax not exceeding that percentage. For the purpose of ascertaining the taxable income the statute divides taxpayers into three classes,—individuals, ordinary corporations, and public service corporations (including railroads). The statute, in terms, taxes only net income. For railroads and other public service corporations required to keep accounts according to the method established by the Interstate Commerce Commission, it makes those accounts the basis for determining the 'net operating income' (Sec. 202, as amended); and it directs that, in order to ascertain the 'net income,' there shall be deducted from the net operating income, (a) uncollectible revenue, (b) taxes for the income year, other than income taxes and war profits and excess profits taxes; (c) amounts paid for car hire. Whether the statute is unconstitutional, because it fails to include among the deductions from income allowed public service corporations the capital charges, including other rentals paid, is the main question for decision." The appellants conceded that taxation of the net income of an interstate carrier does not violate the Commerce Clause. The state conceded that taxation of gross receipts would be void as burdening interstate commerce. The decision of the District Court was affirmed. In its opinion the United States Supreme Court said: "Under the commerce clause it is essential that a state tax shall not directly burden interstate commerce and that it shall not dis-

criminate against interstate commerce. With these essentials the North Carolina Act complies. It is not assessed on gross receipts. Citing authority. It does not discriminate against interstate commerce. For the taxable net income of other public service corporations which are wholly intrastate is determined also without allowing capital charges as a deduction. That there is no basis for the claim that the commerce clause is violated by the burden resulting from the aggregate of the several North Carolina railroad taxes was settled in *Southern R. Co.* v. *Watts,* 260 U. S. 519, ante 375, 43 Sup. Ct. Rep. 192, (67 L. Ed. 375)." The third headnote in the case as reported in 67 L. Ed. 1051 is: "The imposition of a tax by a state upon the net income of an interstate railroad from operations within the state, without allowing deduction for payments of interest and rent, which are in fact capital charges, does not violate the interstate commerce provision of the Federal Constitution."

The Supreme Court of California, sitting in banc, in *West Pub. Co.* v. *McColgan,* 27 Cal. 2d 705, 166 P. 2d 861, upheld in a learned and convincing opinion the right of the State of California to collect an income tax from the West Publishing Company, which was engaged in interstate commerce, and had not qualified to do intrastate business in California, based on the West Publishing Company's net income derived within the State. The judgment of the California Supreme Court was affirmed by the Supreme Court of the United States on 10 June 1946, 328 U. S. 823, 90 L. Ed. 1603, and a rehearing was denied by it on 14 October 1946, 329 U. S. 822, 91 L. Ed. 699. To the same effect see the elaborate and scholarly opinions in *Fontenot* v. *John I. Hay Company,* 228 La. 1031, 84 So. 2d 810; and in *State* v. *Northwestern States-Portland Cement Co.,* ..... Minn. ....., 84 N. W. 2d 373. In the last case on 6 January 1958 probable jurisdiction was noted by the

United States Supreme Court. 355 U. S. 911, 2 L. Ed. 2d 272. For a comment on the West Publishing Company case, the case of *Memphis Natural Gas Co.* v. *Stone,* and the Spector case in the United States Supreme Court, see Kraus, The Implications of the Spector Motor Service Case, 56 Dickinson Law Review 107-115.

There is no challenge here that the provisions of our Income Tax Act pertinent to the question before us are discriminatory against interstate commerce, nor are the *amounts* of the income taxes imposed on plaintiff assailed, nor the method of computation of such taxes.

In the light of the legislative intent, as well as the carefully restricted impact of our Income Tax Act as it is applicable to plaintiff, and by virtue of the authorities above set forth, we can only conclude, that the North Carolina statutes, under which the income taxes were imposed on plaintiff in the instant case, do not constitute a burden on interstate commerce, and do not violate the Commerce Clause of the Federal Constitution.

Plaintiff's second and last contention is that the collection of the income taxes from plaintiff violates "the due process of law" phrase of the 14th amendment to the Federal Constitution, and "the law of the land 2 phrase of Art. I. Sec. 17, of the North Carolina Constitution.

"The term 'law of the land' (as used in Art. I, Sec. 17, of the State Constitution) is synonymous with 'due process of law,' a phrase appearing in the Federal Constitution and the organic law of many states." *S.* v. *Ballance,* 229 N. C. 764, 51 S. E. 2d 731, 7 A. L. R. 2d 407.

On the question of due process of law the United States Supreme Court in upholding the assessment for local ad valorem taxes of vessels owned by a carrier engaged in in-

terstate commerce and used within the taxing State, where such assessment is based on the ratio between the total number of miles of the carrier's lines in Louisiana and the total number of miles of the entire line, said in *Ott* v. *Mississippi Valley Barge Line Co.*, 336 U. S. 169, 93 L. Ed. 585: "The problem under the Commerce Clause is to determine 'what portion of an interstate organism may appropriately be attributed to each of the various states in which it functions.' Citing authority. So far as due process is concerned the only question is whether the tax in practical operation has relation to opportunities, benefits, or protection conferred or afforded by the taxing State. Citing authority. Those requirements are satisfied if the tax is fairly apportioned to the commerce carried on within the State. There is such an apportionment under the formula of the Pullman Case. Moreover, that tax, like taxes on property, taxes on activities confined solely to the taxing State, or taxes on gross receipts apportioned to the business carried on there, has no cumulative effect caused by the interstate character of the business. Hence there is no risk of multiple taxation. Finally, there is no claim in this case that Louisiana's tax discriminates against interstate commerce. It seems therefore to square with our decisions holding that interstate commerce can be made to pay its way by bearing a nondiscriminatory share of the tax burden which each State may impose on the activities or property within its borders."

In *Miller Bros. Co.* v. *Maryland*, 347 U. S. 340, 98 L. Ed. 744, the Court said: ". . . due process requires some definite link, some minimum connection, between a state and the person, property or transaction it seeks to tax."

The agreed stipulation of facts shows that plaintiff engages in substantial income producing activities in North Carolina. Plaintiff rents and maintains freight terminals

in various places in the State for its interstate operations, for which terminals it paid in rent for its fiscal year ending 30 June 1955 the sum of $21,911.00, and a similar rent for its fiscal year ending 30 June 1956. It owns and operates pickup and delivery trucks in North Carolina for use at its terminals, and owns furniture, fixtures and equipment in its terminals in North Carolina for use in its business in North Carolina. Its delivery trucks pick up interstate freight from its customers in North Carolina destined for or consigned to points or parties outside of North Carolina, and take such freight to its terminals in North Carolina. When freight is received at its various terminals in North Carolina, it is delivered to the consignees, either direct from the interstate vehicles, or in delivery trucks stationed at the respective terminals. Its terminals in North Carolina are manned by its employees, who usually live in North Carolina. The agreed stipulation of facts does not state the number of such employees in North Carolina, nor the total amount of their salaries, nor the number of plaintiff's terminals in North Carolina, nor the number of its delivery trucks at its terminals in North Carolina, nor the amount of money it receives in North Carolina for bringing in or carrying out freight. However, it would seem from a consideration of the entire agreed stipulation of facts that the number of plaintiff's employees at its terminals in North Carolina, their salaries, the number of its delivery trucks there stationed, and the money it collects in North Carolina in its business, are considerable. The State of North Carolina provides a place and opportunity for plaintiff's employees in North Carolina to solicit business, and make contracts for plaintiff in North Carolina to carry freight for its residents out of North Carolina, and they undoubtedly made such contracts for plaintiff, in competition with other interstate carriers by railroad, express, etc., operat-

ing in North Carolina. The State of North Carolina protects plaintiff's business transactions and property within its borders, for instance, against vandalism, larceny, etc., and maintains courts in which plaintiff can enforce payment for the transportation of articles it brings within this State to its customers here, and for the transportation of articles which it carries out of this State for residents here. The business of plaintiff carried on in North Carolina was neither irregular nor casual. It was systematic and continuous throughout the periods of time in question. There are incidents in the carrying on of plaintiff's business taking place in North Carolina, and only here, for which the State of North Carolina affords protection received from no other State, or the United States. Nor can any other State give that protection.

The activities of the International Shoe Company in the State of Washington, as described in *International Shoe Co.* v. *Washington,* 326 U. S. 310, 90 L. Ed. 95, 161 A. L. R. 1057, which served as the constitutional basis for the imposition of the tax there involved, were, it seems, in substance no more extensive than the activities of plaintiff in North Carolina.

In *Memphis Natural Gas Co.* v. *Stone, supra,* we have stated the facts of that case, as they appear in the United States Supreme Court Reports. Certainly the business acts of the Gas Company in Mississippi in that case are not greater than the business acts of plaintiff in North Carolina. In the Gas Company case the United States Supreme Court said: "There is no question here of Due Process. The Gas Company's property is in the taxing state where the taxable incidents occurred."

The activities of the West Publishing Company in California, where it had not qualified to do intrastate business,

as set forth in *West Publishing Co.* v. *McColgan, supra,* do not seem to be more extensive than the activities of plaintiff in North Carolina. See also *Fontenot* v. *John I. Hay Company, supra.* See also *McGee* v. *International Life Ins. Co.,* 355 U. S.——, 2 L. Ed. 2d 223, where the Court held that it is sufficient for purposes of due process that a suit against a nonresident not served with process within the forum State is based upon a contract which has substantial connection with that State.

In the collection of the income taxes from plaintiff in the instant case, we find no violation of "the due process of law" provision of the 14th amendment to the Federal Constitution, and of "the law of the land" provision of Art. I, Sec. 17, of the North Carolina Constitution.

Under our dual system of government, the exercise of the taxing power is equally essential to the United States and to the constituent States. Under the facts of this case we conclude that it is clearly manifest that the State of North Carolina has the right to collect the nondiscriminatory income taxes imposed on plaintiff, which taxes were imposed solely on that part of plaintiff's net income earned within the State of North Carolina in its interstate business, and reasonably attributable to its interstate business done or performed within the borders of this State.

The judgment of the trial court is

Affirmed.

Rodman, J. took no part in the consideration and decision of this case.

JUDGMENT

SUPREME COURT OF NORTH CAROLINA
Spring Term, 1958

No. 451 Wake County

ET&WNC TRANSPORTATION COMPANY,
A Corporation,

vs

JAMES S. CURRIE, Commissioner of Revenue
of The State of North Carolina

This cause came on to be argued upon the transcript of the record from the Superior Court, Wake County: Upon consideration whereof, this Court is of opinion that there is no error in the record and proceedings of said Superior Court.

It is therefore considered and adjudged by the Court here that the opinion of the Court, as delivered by the Honorable R. Hunt Parker, Justice, be certified to the said Superior Court, to the intent that the Judgment is Affirmed, And it is considered and adjudged further, that the plaintiff do pay the costs of the appeal in this Court incurred, to wit, the sum of Thirty-six and no/100 dollars ($36.00), and execution issue therefor.

Adrian J. Newton
Clerk of the Supreme Court

By: /s/ Sarah G. Barbee
Sarah G. Barbee, Deputy Clerk

A TRUE COPY

(SEAL)

APPENDIX "B"

IN THE SUPERIOR COURT
NORTH CAROLINA
WAKE COUNTY

ET&WNC TRANSPORTATION COMPANY,
a Corporation,
Plaintiff

vs.

JAMES S. CURRIE, Commissioner of Revenue
of the State of North Carolina,
Defendant

JUDGMENT

This cause coming on to be heard and being heard before His Honor C. W. Hall, Judge presiding, at the October 1957 Term of the Superior Court of Wake County on Agreed Stipulations of Fact, Numbered 1 and 2, which the Court finds to be the facts in this cause, and on a stipulation for waiver of trial by jury; and the Court, after hearing and considering the pleadings, Stipulations of Fact, and arguments of counsel, being of the opinion and concluding as a matter of law that the tax assessed and collected from the plaintiff and which the plaintiff seeks to recover in this action was lawfully and properly assessed and collected and that the plaintiff is, therefore, entitled to recover nothing of the defendant;

NOW, THEREFORE, IT IS ORDERED, ADJUDGED AND DECREED that the plaintiff recover nothing of the defendant and that the defendant recover of the plaintiff the costs, to be taxed by the Clerk.

This the 30th day of October, 1957.

C. W. HALL
Judge Presiding

STIPULATION OF FACTS
NOS. 1 and 2

The following facts are stipulated and agreed to for the trial of the case, in lieu of testimony or evidence thereof otherwise, to wit:

1. That plaintiff is a corporation organized under the laws of the State of Delaware, with its principal office in Johnson City, Tennessee.

That it has no principal office in North Carolina. In fact, it has no offices of any kind in North Carolina except such as are incident to its motor freight terminals which are necessary for its interstate operations in North Carolina.

That it is not domesticated in North Carolina and has never been domesticated in that State.

That it has no intrastate business in North Carolina and has never had.

That it has not been authorized by North Carolina to do intrastate trucking and it does not engage in it.

That all of its business and operations in North Carolina are now and have always been exclusively interstate in character.

That plaintiff is a common carrier of freight for compensation by motor vehicle in interstate commerce only, except in Tennessee where it does both an interstate and intrastate business. With the exception of Tennessee, plaintiff's business is the interstate transportation or hauling of freight by motor truck between the states of North Carolina, South Carolina, Virginia, Tennessee and Georgia. In Tennessee it engages in both interstate and intrastate transportation of freight by motor vehicle, but it has no intrastate activities anywhere except in Tennessee.

That all of plaintiff's interstate business is authorized, permitted, supervised and directed under and within the jurisdiction of the Interstate Commerce Commission under and in accordance with the Federal Motor Carrier Act of the Congress of 1935, and amendments thereto (USCA, Title 49, Section 301, et seq.) and the Commerce Clause of the Federal Constitution (U. S. Const., Art. 1, Sec. 8, cl. 3). Its intrastate business, which is in Tennessee only, is under and within the jurisdiction of the Tennessee Public Service Commission.

2. That the defendant is and was at the times hereinafter mentioned the duly appointed, qualified and acting Commissioner of Revenue of the State of North Carolina, and resides in the County of Wake, State of North Carolina.

3. That, with respect to the allegations contained in paragraph 3 of the complaint, the defendant admits that the purpose of the action is to recover the sum of $15,812.80 paid by the plaintiff to the defendant in satisfaction of income taxes due to the State of North Carolina as asserted by the defendant and as required by the defendant to be paid by the plaintiff. The defendant further admits that said sum, which includes taxes and interest, was paid under protest and that the plaintiff demanded a refund of same and that the defendant refused to refund the amount paid.

4. That the income taxes which defendant required the plaintiff to pay were levied pursuant to the provisions of Article 4 of Chapter 105 of the General Statutes of North Carolina and in particular Sections 105-134 and 105-136 of said Article and Chapter.

That Section 105-134 of the General Statutes of North Carolina contains in general the provisions attributed to said Section by the allegations contained in paragraph 4 of the complaint.

That G. S. 105-134 imposes an annual income tax equivalent to 6% of a proportion of the net income of a foreign corporation doing business in North Carolina, and that such proportion to which the income rate of 6% is to be applied must be determined, in the plaintiff's case, under the provisions of G. S. 105-136 of the General Statutes of North Carolina.

5. That in addition to the status and activities of the plaintiff, as set forth in Section 1 above, plaintiff maintains freight terminals at various places in North Carolina but solely for its interstate business and operations.

That these terminals are manned by employees who usually live in North Carolina but whose duties pertain only to plaintiff's interstate activities.

That these terminals are rented from third parties as plaintiff owns no real estate in North Carolina, nor does plaintiff own any personal property in North Carolina except such pickup and delivery trucks as are necessary for its interstate business, which said trucks are licensed in North Carolina because they are based there, together with such terminal furniture, fixtures and equipment as are necessary for said terminals.

That plaintiff transports or hauls into North Carolina interstate freight only by its interstate or over-the-road motor vehicles, usually tractor-semi-trailer units.

That when this freight is received at the various terminals it is delivered to the consignees either direct from said over-the-road vehicles or in delivery trucks which are stationed at the respective terminals.

That these same delivery trucks pick up interstate freight from plaintiff's patrons—shippers or consignors in North Carolina—destined for or consigned to points or parties

outside of North Carolina, and take such freight to said respective terminals where it is billed and loaded into interstate trucks and thereupon transported to destinations beyond and outside of North Carolina.

That usually when a full truckload of freight is shipped to or from any customer in North Carolina plaintiff's over-the-road trucks go directly to the customer's place of business, though sometimes said truckloads go by the terminal when it is too late to deliver the freight at night or to get started on its interstate journey, or when Sunday or a holiday intervenes.

In the case of less-than-truckload shipments, pickup trucks operated by plaintiff gather the freight from customers for assembly into full truckloads at plaintiff's respective terminals which are maintained within the State.

That these pickup trucks, either delivering or picking up shipments of freight, merely act as a part of the interstate transportation of freight.

That plaintiff does not handle any shipments originating at points in North Carolina and destined to other points in North Carolina.

That the only freight handled is that which either originates outside of North Carolina or is destined outside of that state.

6. (a) That as alleged in paragraph 6 of plaintiff's complaint, plaintiff paid rentals in North Carolina on its various and respective terminals used in its interstate business in that state during the fiscal year from July 1, 1954, to June 30, 1955, in the amount of $21,911.00.

(b) That in addition to said rentals, plaintiff paid to

North Carolina during said fiscal year ending June 30, 1955, the following taxes, to wit:

Gasoline taxes of	$38,868.00
Truck license taxes of	6,294.00
Personal property taxes of	394.00
N. C. unemployment taxes of	3,338.00
Intangible property taxes of	60.00
Total taxes paid in North Carolina	$48,954.00

(c) That during said fiscal year plaintiff paid substantial rents and taxes in other states in which it operated except the State of Virginia.

(d) That as alleged in paragraph 7 of plaintiff's complaint, during said fiscal years ending June 30, 1955, and June 30, 1956, the over-the-road vehicles which plaintiff operated between the various states in which it did business were largely based in Tennessee and taxed in Tennessee. Said over-the-road vehicles operated on their Tennessee license tags in the states in which plaintiff operated other than Tennessee under reciprocal agreements between Tennessee and said other states, which agreements provide, among other things, that said over-the-road vehicles operating between said states are to be taxed and tagged in the state of the carrier's domicile or principal place of business and then excused from further motor vehicle taxes in the other states in which the carrier operates.

That plaintiff's domicile and principal place of business being in the State of Tennessee, and in Johnson City, Tennessee, in accordance with the reciprocal agreement between Tennessee and North Carolina, plaintiff paid license tag taxes to Tennessee for its over-the-road trucks in the

amount of $71,886.38 for the fiscal year ending June 30, 1955.

7. That the facts and figures set forth in paragraph 6 of this stipulation, applicable to plaintiff during the fiscal year from July 1, 1955, to and including June 30, 1956, are as follows:

(a) Rentals for North Carolina Terminals	$21,936.00
(b) Gasoline Taxes of	34,995.00
Truck license taxes of	8,890.00
Personal property taxes of	705.00
N. C. Unemployment taxes	2,772.00
Intangible property taxes of	50.00
Total Taxes paid in North Carolina	$47,412.00

(c) That during said fiscal year plaintiff paid substantial rentals and taxes in other states in which it operated except the State of Virginia.

(d) That plaintiff paid license tag taxes to Tennessee for its over-the-road trucks in the amount of $78,589.00.

8. That on or about August 31, 1954, the defendant Commissioner, by letter of that date, for the first time requested plaintiff to furnish him with certain information with respect to its operations in North Carolina and to give reasons why income tax returns had not been filed.

That the information requested was furnished by plaintiff in its letter to the defendant, dated September 9, 1954, in which letter plaintiff briefly set forth substantially the same reasons it is now giving in this complaint why it is not subject to income taxes in North Carolina.

That later, and on or about the 7th day of October, 1954,

the defendant notified the plaintiff that as Commissioner of Revenue of the State of North Carolina he proposed to assess and levy a tax upon the income of the plaintiff pursuant to the applicable provisions of Chapter 105 of the General Statutes of North Carolina; said Commissioner at said time further demanded that information be furnished his office from the books and records of the plaintiff whereby the amount of said tax to be so assessed and levied might be determined.

9. That thereafter, at the request of plaintiff, and on or about January 3, 1955, a hearing was held in the office of the defendant at Raleigh, North Carolina, at which time plaintiff presented certain facts and the law applicable thereto, and by virtue of which it contended it was not liable for the payment of any taxes as proposed to be imposed upon it by the defendant, for substantially the same reasons now given to the court.

10. That thereafter and on or about June 17, 1955, the defendant rendered a decision on the question as to whether plaintiff was required to pay said income tax, and directed that plaintiff file income tax returns, and, upon failure to so do, that taxes be assessed in accordance with the provisions of the Revenue Act of the State of North Carolina.

11. That thereafter and on or about June 28, 1955, plaintiff prepared and filed income tax returns for the years ending June 30, 1950, June 30, 1951, June 30, 1952, June 30, 1953, and June 30, 1954.

12. That thereafter and on or about June 29, 1955, defendant made an assessment against the plaintiff for income tax as follows:

Year	Amount
June 30, 1950	$4,265.23

June 30, 1951	3,706.09
June 30, 1952	1,735.20
June 30, 1953	3,872.89
June 30, 1954	890.44

and notified this plaintiff of said assessment in accordance with a letter, copy of which is attached to, marked "Exhibit A," and made a part of the complaint and this stipulation.

13. That after the receipt of the letter of the defendant, hereinbefore set forth as Exhibit "A" to the complaint and this stipulation, plaintiff in accordance with the statutory law of North Carolina in such cases made and provided, paid to the defendant under protest on the 5th day of July, 1955, the taxes so assessed by the defendant against it, as hereinbefore set forth, in the amount of $14,471.85; that a copy of the check delivered to and accepted by defendant in payment of said taxes is attached to the complaint and marked Plaintiff's Exhibit "B" and made a part of this stipulation.

14. That on or about the 25th day of July, 1955, the plaintiff, in accordance with the statute in such cases made and provided, made a demand in writing upon the defendant for the refund of the taxes paid in the amount of $14,-471.85, with interest thereon, but defendant has and does refuse to refund said payments.

15. That on or about the 19th day of July, 1955, the defendant made a further assessment against this plaintiff for income taxes alleged to be due and payable and in the amount of $1,045.86, and covering a period of time from January 1, 1949, to June 30, 1949; that a copy of said notice of tax assessment is attached to the complaint and marked Plaintiff's Exhibit "C", and made a part of this stipulation.

16. Plaintiff, in accordance with the statutory laws of North Carolina in such cases made and provided, paid to defendant under protest, on the 25th day of July, 1955, the taxes so assessed against it by defendant, as hereinbefore set forth, in the amount of $1,045.86; a copy of the check delivered to and accepted by defendant in payment of said taxes is attached to the complaint and marked Plaintiff's Exhibit D, and made a part of this stipulation.

17. That on or about August 6, 1955, the plaintiff, in accordance with the statute in such cases made and provided, made demand in writing upon defendant for the refund of the taxes paid in the amount of $1,045.86, with interest thereon, but defendant has and does refuse to refund said payments.

18. That on or about September 23, 1955, defendant made an assessment against plaintiff for income taxes alleged to be due for the year beginning July 1, 1954, and ending June 30, 1955, in the amount of $295.09; that thereafter and on or about September 23, 1955, the plaintiff paid under protest to defendant said amount of $295.09; a copy of the check delivered to and accepted by defendant in payment of said taxes is attached to the complaint and marked Plaintiff's Exhibit "E" and made a part of this stipulation.

19. That on October 10, 1955, the plaintiff, in accordance with the statute in such cases made and provided, made demand in writing upon the defendant for the refund of taxes paid in the amount of $295.09, with interest thereon, but defendant has and does refuse to refund said payment.

WHEREFORE, plaintiff and defendant, by their respective counsel, on this the 31 day of January, 1957, stipulate the above facts and agree that said stipulation may be used as evidence on the trial of the case; provided, however;

"It is understood by the parties hereto that this stipulation shall not preclude either party from offering evidence at the trial of the case concerning matters other than those set forth in the foregoing stipulation."

HARKINS, VAN WINKLE, WALTON AND BUCK

By KESTER WALTON
COX, EPPS, POWELL & WELLER

By JAMES H. EPPS, JR.
Attorneys for Plaintiff,
ET&WNC Transportation Company.

GEORGE B. PATTON,
SAMUEL BEHRENDS, JR.,
Attorneys for Eugene G. Shaw
Commissioner of Revenue of the
State of North Carolina.

PLAINTIFF'S EXHIBIT A

STATE OF NORTH CAROLINA
DEPARTMENT OF REVENUE
INCOME TAX DIVISION
RALEIGH, NORTH CAROLINA

NOTICE OF TAX ASSESSMENT

IMPORTANT

Action Must Be Taken Within Thirty Days

June 29, 1955

To ET&WNC Transportation Company
Johnson City, Tennessee

You are hereby notified that an assessment for income tax and interest is made against you as of this date in the amount indicated below as result of examination of your income tax return filed for the following year:

YEAR	AMOUNT
6-30-50	$4 265 23
6-30-51	3 706 09
6-30-52	1 737 20
6-30-53	3 872 89
6-30-54	890 44

This assessment is based upon: Letter attached.

This assessment is made pursuant to Section 105-241.1 of the General Statutes of North Carolina, which provides, in part, as follows:

"Any taxpayer feeling aggrieved by such assessment shall be entitled to a hearing before the Commissioner of Revenue upon making application therefor in writing within

thirty days after the receipt of notice of assessment. If no application for a hearing is made within thirty days after notice of assessment is given, the assessment shall be final and conclusive."

EUGENE G. SHAW, COMMISSIONER

By: /s/ W. H. HUGHES, JR.
W. H. Hughes, Jr., Director
Corporation Income Tax Division

WHH:mb
Important
To Insure Proper Credit
for your Remittance, please
attach same to the Enclosed
Copy of this letter.

PLAINTIFF'S EXHIBIT B

ET&WNC TRANSPORTATION COMPANY

Check No. 77089

Johnson City, Tenn. Audit No. 6-569

JUL 5 1955

ET&WNC $ 14471 AND 85 CTS

Pay to the
order of EUGENE G. SHAW $14,471.85

COMMISSIONER
Department of Revenue
State of North Carolina
Raleigh, North Carolina

D. B. MARION
C. H. TATE
Authorized signatures

HAMILTON NATIONAL BANK
87-74 JOHNSON CITY, TENN.

ET&WNC TRANSPORTATION COMPANY

Statement of account covered by this voucher

1955, July 5—For alleged Income taxes and interest claimed and assessed by Hon. Eugene G. Shaw, Commissioner of Revenue, State of North Carolina, against ET&WNC Transportation Co. for the fiscal years following:

6-30-50	$ 4,265.23
6-30-51	3,706.09
6-30-52	1,737.20
6-30-53	3,872.89
6-30-54	890.44
	$14,471.85

Said alleged taxes and interest are paid by ET&WNC Transportation Co. under protest, and notice is given that claim for refund will be filed in accordance with the law $14,471.85

DETACH CHECK AND KEEP THIS MEMO FOR YOUR FILES

PLAINTIFF'S EXHIBIT C

STATE OF NORTH CAROLINA
DEPARTMENT OF REVENUE
INCOME TAX DIVISION

NOTICE OF TAX ASSESSMENT

IMPORTANT

Action Must Be Taken
Within Thirty Days

July 19, 1955

To ET&WNC Transportation Company
Johnson City, Tennessee

You are hereby notified that an assessment for income tax and interest is made against you as of this date in the amount indicated below as result of examination of your income tax return filed for the following year:

YEAR	AMOUNT
1-1-49 to 6-30-49	$1,045.86

This assessment is based upon: Letter attached

This assessment is made pursuant to Section 105-241.1 of the General Statutes of North Carolina, which provides, in part, as follows:

"Any taxpayer feeling aggrieved by such assessment shall be entitled to a hearing before the Commissioner of Revenue upon making application therefor in writing within thirty days after the receipt of notice of assessment. If no application for a hearing is made within thirty days after notice of assessment is given, the assessment shall be final and conclusive."

EUGENE G. SHAW, COMMISSIONER

By: /s/ W. H. HUGHES, JR.

W. H. Hughes, Jr., Director
Corporation Income Tax Division

WHH:mb
Important
To Insure Proper Credit
for your Remittance, please
attach same to the Enclosed
Copy of this letter.

PLAINTIFF'S EXHIBIT D

ET&WNC TRANSPORTATION COMPANY

Check No. 77679

Johnson City, Tenn. Audit No. 9-277

JUL 25 1955

ET&WNC $ 1045 AND 86 CTS

Pay to the Order
of EUGENE G. SHAW, COMMISSIONER $1,045.86

Department of Revenue
State of North Carolina
Raleigh, North Carolina

D. B. MARION
C. H. TATE
Authorized signatures

HAMILTON NATIONAL BANK
87-74 JOHNSON CITY, TENN.

ET&WNC TRANSPORTATION COMPANY

Statement of account covered by this voucher

1955, July 25—For alleged Income Taxes and interest claimed and assessed by Hon. Eugene G. Shaw, Commissioner of Revenue, State of North Carolina, against ET&WNC Transportation Company for the period January 1, 1949, to June 30, 1949. Said alleged taxes and interest are paid by ET&WNC Transportation Company under protest and notice is given that claim for refund will be filed in accordance with the law $1,045.86

DETACH CHECK AND KEEP THIS MEMO FOR YOUR COPY

PLAINTIFF'S EXHIBIT E

Check No. 79281
AUDIT No. 9-103

ET&WNC TRANSPORTATION COMPANY
Johnson City, Tenn. Sep 19 1955 9611251

ET&WNC $ 295 AND 09 CTS

Pay to the order $295.09
of EUGENE G. SHAW, COMMISSIONER

Department of Revenue
State of North Carolina
Raleigh, North Carolina

W. W. WHISMAN
D. B. MARION
Authorized signatures

HAMILTON NATIONAL BANK
87-74 Johnson City, Tenn.

ET&WNC TRANSPORTATION COMPANY

Statement of account covered by this voucher

1955, Sept. 19—For alleged Income Taxes and interest claimed and assessed by Hon. Eugene G. Shaw, Commissioner of Revenue, State of North Carolina against ET&WNC Transportation Company for the period 7/1/54 to 6/30/55. Said alleged taxes and interest are paid by ET&WNC Transportation Company under protest and notice is given that claim for refund will be filed in accordance with the law $294.11

Interest—1 mo. @ 4% ..... .98

$295.09

APPENDIX "C"

STATUTE INVOLVED

When first adopted in 1939 by the Public Laws of North Carolina, Regular Session 1939, chapter 158, Section 311, and section 312, the Statutes which are referred to herein as North Carolina General Statute 105-134 and 105-136, read as follows:

"*Section 311. Corporations.*

I. Domestic Corporations.

Every corporation organized under the laws of this State shall pay annually an income tax equivalent to six per cent on the entire net income, as herein defined, received by such corporation during the income year.

II. Foreign Corporations.

Every foreign corporation doing business in this State shall pay annually an income tax equivalent to six per cent of a proportion of its entire net income, to be determined according to the following rules:

1. If the principal business of a company in this State is manufacturing, or if it is any form of collecting, buying, assembling, or processing goods and materials within this State, the entire net income of such corporation shall be apportioned by North Carolina on the basis of the ratio obtained by taking the arithmetical average of the following two ratios:

(a) The ratio of the book value of its real estate and tangible personal property in this State on the date of the close of the calendar or the fiscal year of such corporation in the income year is to the book value of its entire real estate and tangible personal

property then owned by it, with no deductions on account of encumbrances thereon.

(b) The ratio of the total cost of manufacturing, collecting, buying, assembling, or processing within this State during the income year to the total cost of manufacturing, collecting, buying, assembling, or processing within and without the State. The term 'cost of manufacturing, collecting, buying, assembling, or processing within and without this State', as used herein, shall be interpreted in a manner to conform as nearly as may be to the best accounting practice in the trade or business. Unless in the opinion of the Commissioner of Revenue the peculiar circumstances in any case justify a different basis, this term shall be generally interpreted to include as elements of cost within and without this State the following:

(c) The total cost of all goods, materials, and supplies used in manufacturing, assembling, or processing, regardless of where purchased.

(d) The total wages and salaries paid or accrued during the income year in such manufacturing, assembling or processing activities.

(e) The total overhead or manufacturing burden properly assignable according to good accounting practice to such manufacturing, assembling or processing activities. Not including, however, property, privilege, stamp or other taxes.

(f) The term 'book value' as used herein shall be defined to mean original cost plus additions and improvements less reserve for depreciation on the date of the close of the calendar or fiscal year of such company, unless in the opinion of the Commissioner of Revenue

the peculiar circumstances in any case justify a different basis.

(g) The words 'tangible personal property' shall be taken to mean corporeal personal property such as machinery, tools, implements, goods, wares and merchandise, and shall not be taken to mean cash on hand or in bank, shares of stock, bonds. notes, accounts receivable, credits, special privileges, franchises, good will, or evidence of an interest in property and evidences of debt.

(h) The word 'manufacturing' shall be defined as mining and all processes of fabricating or of curing raw materials.

2. If the principal business of a company in this State is selling, distributing or dealing in tangible personal property within this State, the entire net income of such company shall be apportioned to North Carolina on the basis of the ratio obtained by taking the arithmetical average of the following two ratios.

(a) The ratio of the book value of its real estate and tangible personal property in this State on the date of the close of the calendar or fiscal year of such company in the income year is to the book value of its entire real estate and tangible property then owned by it, with no deduction on account of encumbrances thereon.

(b) The ratio of the total sales made through or by offices, agencies, or branches located in North Carolina during the income year to the total sales made everywhere during said income year.

(c) The word 'sales' as used in this section shall be defined as sale or rental of real estate and sale or rental of tangible properties.

(d) The term 'book value' as used herein shall be defined to mean original cost plus additions and im-

provements less reserve for depreciation on the date of the close of the calendar or fiscal year of such company, unless in the opinion of the Commissioner of Revenue the peculiar circumstances in any case justify a different basis.

(e) The words 'tangible personal property' shall be taken to mean corporeal personal property such as machinery, tools, implements, goods, wares and merchandise, and shall not be taken to mean cash on hand or in bank, shares of stock, bonds, notes, accounts receivable, credits, special privileges, franchises, good will, or evidence of an interest in property and evidences of debt.

(f) Foreign insurance companies doing business in this State and returning premium receipts to the Insurance Commissioner, and paying the tax upon such premium receipts as provided in Section two hundred and eight of this article shall be exempt from this tax on income in so far as the income is derived from their insurance business. However, in case of a foreign insurance company owning real estate in this State from which rents are received it is required to file an income tax return reporting income received from such real estate in this State and take credit for actual expenses incurred in connection therewith.

3. If a company deriving profits principally from sources other than holding or sale of tangible property, such proportion as its gross receipts in this State during the income year is to its gross receipts for such year within and without the State.

(a) The words 'gross receipts' as used in this section shall be taken to mean and include the entire receipts for business done by such company.

Sec. 312. Railroads and public-service corporations. The basis of ascertaining the net income of every

corporation engaged in the business of operating a steam, electric railroad, express service, telephone or telegraph business, or other form of public service, when such company is required by the Interstate Commerce Commission to keep records according to its standard classification of accounting, shall be the 'net revenue from operations' of such corporation as shown by their records, kept in accordance with that standard classification of accounts when their business is wholly within this State, and when their business is in part within and in part without the State, their net income within this State shall be ascertained by taking their gross 'operating revenues' within this State, including in their gross 'operating revenues' within this State the equal mileage proportion within this State of their interstate business, and deducting from their gross 'operating revenues' the proportionate average of 'operating expense' or 'operating ratio' for their whole business, as shown by the Interstate Commerce Commission standard classification of accounts:

Provided, that if the standard classification of operating expenses prescribed by the Interstate Commerce Commission for railroads differs from the standard classification of operating expenses prescribed the Interstate Commerce Commission for other public-service corporations, such other public-service corporations shall be entitled to the same operating expenses as prescribed for railroads. From the net operating income thus ascertained shall be deducted 'uncollectible revenue' and taxes paid in this State for the income year other than income taxes, and the balance shall be deemed to be their net income taxable under this article. That in determining the taxable income of a corporation engaged in the business of operating a rail-

road under this section, in the case of a railroad located entirely within this State, the net operating income shall be increased or decreased to the extent of any credit or debit balance received or paid, as the case may be, on account of car or locomotive hire; and when any railroad is located partly within and partly without this State, the said net operating income shall be increased or decreased to the extent of an equal mileage proportion within this State of any credit or debit balance received or paid, as the case may be, on account of car or locomotive hire.

For the purposes of this section the words 'interstate business' shall mean, as to transportation companies, operating revenue earned within the State by reason of the interstate transportation of persons or property into, out of, or through this State, and as to transmission companies the interstate transmission of messages into, out of, or through the State.

The words 'equal mileage proportion within the State' shall mean the proportion of revenue received by the company operating in this State from interstate business as defined in the preceding paragraph, which the distance of movement over lines in this State bears to the total distance of movement over lines of the company receiving such revenue. If the Commissioner of Revenue shall find, with respect to any particular company, that its accounting records are not kept so as to reflect with exact accuracy such division of revenue by State lines as to each transaction involving interstate revenue, the Commissioner of Revenue may adopt such regulations, based upon averages, as will approximate with reasonable accuracy the proportion of interstate revenue actually earned upon lines in this State.

The words 'proportionate average of 'operating expenses' or 'operating ratio' ' shall mean the proportion of gross revenue of a company, on its whole business absorbed in operating expenses, as defined in the Interstate Commerce Commission classification of accounts.

In determining the taxable income of a railroad company operating two or more lines of railroad not physically connected, and when one of such railroad lines is located wholly within this State, the actual earnings and expenses of such line in this State, in so far as they may be severable, shall be used in determining net income taxable in this State.

With respect to leased lines operated in this State where the operating company pays a tax on the income earned on such leased lines, without deduction for lease rental, and on a sum properly allocable to such leased lines equal to the amount of lease rental paid, such lease rental shall not be taxable income against the lessor.

All other public service corporations shall file under Section three hundred and eleven of this article."

The two statutes referred to herein as North Carolina General Statutes 105-134 and 105-136, after certain amendments in 1941, 1943, and 1945, read as follows on January 1, 1949, the first day for which taxes were assessed and paid under protest in this case:

"Section 105-134. *Corporations.*

I. Domestic Corporations. —

Every corporation organized under the laws of this State shall pay annually an income tax equivalent to six per cent on the entire net income, as herein defined, received by such corporation during the income year.

II. Foreign Corporations. —

Every foreign corporation doing business in this State shall pay annually an income tax equivalent to six per cent of a proportion of its entire net income, to be determined according to the following rules:

1. If the principal business of a company in this State is manufacturing, or if it is any form of collecting, buying, assembling, or processing goods and materials within this State, the entire net income of such corporation shall be apportioned by North Carolina on the basis of the ratio obtained by taking the arithmetical average of the following two ratios:

(a) The ratio of the book value of its real estate and tangible personal property in this State on the date of the close of the calendar or the fiscal year of such corporation in the income year is to the book value of its entire real estate and tangible personal property then owned by it, when no deductions on account of encumbrances thereon.

(b) The ratio of the total cost of manufacturing, collecting, buying, assembling, or processing within this State during the income year to the total cost of manufacturing, collecting, buying, assembling, or processing within and without the State. The term 'cost of manufacturing, collecting, buying, assembling, or processing within and without this State,' as used herein, shall be interpreted in a manner to conform as nearly as may be to the best accounting practice in the trade or business. Unless in the opinion of the Commissioner of Revenue the peculiar circumstances in any case justify a different basis, this term shall be generally interpreted to include as elements of cost within and without this State the following:

(c) The total cost of all goods, materials, and supplies used in manufacturing, assembling, or processing, regardless of where purchased.

(d) The total wages and salaries paid or accrued during the income year in such manufacturing, assembling, or processing activities.

(e) The total overhead or manufacturing burden properly assignable according to good accounting practice to such manufacturing, assembling, or processing activities, not including, however, property, privilege, stamp or other taxes.

(f) The term 'book value' as used herein shall be defined to mean original cost plus additions and improvements less reserve for depreciation on the date of the close of the calendar or fiscal year of such company, unless in the opinion of the Commissioner of Revenue the peculiar circumstances in any case justify a different basis.

(g) The words 'tangible personal property' shall be taken to mean corporeal property such as machinery, tools, implements, goods, wares and merchandise, and shall not be taken to mean cash on hand or in bank, shares of stock, bonds, notes, accounts receivable, credits, special privileges, franchises, good will, or evidence of an interest in property and evidences of debt.

(h) The word 'manufacturing' shall be defined as mining and all processes of fabricating or of curing raw materials.

2. If the principal business of a company in this State is selling, distributing or dealing in tangible personal property within this State, the entire net income of such company shall be apportioned to North Carolina on the basis of the ratio obtained by taking the

arithmetical average of the following two ratios.

(a) The ratio of the book value of its real estate and tangible personal property in this State on the date of the close of the calendar or fiscal year of such company in the income year is to the book value of its entire real estate and tangible property then owned by it, with no deduction on account of encumbrances thereon.

(b) The ratio of the total sales made through or by offices, agencies, or branches located in North Carolina during the income year to the total sales made everywhere during said income year.

(c) The word 'sales' as used in this section shall be defined as sale or rental of real estate and sale or rental of tangible properties.

(d) The term 'book value' as used herein shall be defined to mean original cost plus additions and improvements less reserve for depreciation on the date of the close of the calendar or fiscal year of such company, unless in the opinion of the Commissioner of Revenue the peculiar circumstances in any case justify a different basis.

(e) The words 'tangible personal property' shall be taken to mean corporeal personal property such as machinery, tools, implements, goods, wares and merchandise, and shall not be taken to mean cash on hand or in bank, shares of stock, bonds, notes, accounts receivable, credits, special privileges, franchises, good will, or evidence of an interest in property and evidences of debt.

3. If the principal business in this State of a corporation is other than that described in subsection 1 or subsection 2 of subdivision II of this section, then the total income of such corporation shall be apportioned to North Carolina on the basis of the ratio of its gross re-

ceipts in this State during the income year to its gross receipts for such year within and without the State.

(a) The words 'gross receipts' as used in this subsection shall be taken to mean and include the entire receipts for business done by such company.

4. If any corporation believes that the method of allocation or apportionment hereinbefore described as administered by the Commissioner of Revenue has operated or will so operate as to subject it to taxation on greater portion of its net income than is reasonably attributable to business or earnings within the State, it shall be entitled to file with the Commissioner a petition setting forth the facts upon which its belief is based and its argument with respect to the application of the allocation formula. This petition shall be filed in such form and within such time as the Commissioner may prescribe. If, after a consideration of the matters involved, it shall be found by the Commissioner upon evidence offered which is clear, cogent and convincing that the application of the allocation formula subjects the corporation to taxation on a greater portion of its income or earnings than is reasonably attributable to business or earnings within this State, the Commissioner shall be authorized to add to the factors of the applicable allocation formula, or substitute for one of the factors of the applicable allocation formula, depending upon whether such addition or such substitution in the opinion of the Commissioner more accurately reflects the income attributable to this State, the following factor:

The ratio of the expenditure of the wages, salaries, commissions or other compensation of whatsoever kind to its officers or employees, assignable to this State as hereinafter provided, to the total expenditure of the

corporation for wages, salaries, commissions, or other compensation of whatsoever kind to all its officers or employees. The amount assignable to this State of the expenditure of the corporation for wages, salaries, commissions or other compensation to its officers or employees shall be such expenditure for the taxable year as represents the compensation of officers or employees not chiefly situated at, connected with or sent out from premises for the transaction of business owned or rented by the corporation outside the State.

The relief herein authorized shall be granted by the Commissioner only in cases of clear, cogent, and convincing proof that the petitioning taxpayer is entitled thereto. There shall be a presumption that the allocation formulae prescribed in subdivisions one (1), two (2), and three (3) of Part II of this section reasonably attribute to North Carolina the proportion of the corporation's income earned in this State, and the burden shall rest upon the corporation to show the contrary. No corporation shall use this alternative factor in making a report or return of its income to this State except upon order in writing of the Commissioner, and any return in which the alternative factor is used without the permission of the Commissioner shall not be a lawful return."

"Section 105-136. *Railroads and public service corporations.*

The basis of ascertaining the net income of every corporation engaged in the business of operating a steam, electric railroad, express service, telephone, or telegraph business, or other form of public service, when such company is required by the Interstate Commerce Commission to keep records according to its

standard classification of accounting, shall be the 'net revenue from operations' of such corporation as shown by their records, kept in accordance with that standard classification of accounts when their business is wholly within this State, and when their business is in part within and in part without the State, their net income within this State shall be ascertained by taking their gross 'operating revenues' within this State, including in their gross 'operating revenues' within this State the equal mileage proportion within this State of their interstate business, and deducting from their gross 'operating revenues' the proportionate average of 'operating expense' or 'operating ratio' for their whole business, as shown by the Interstate Commerce Commission standard classification of accounts: Provided, that if the standard classification of operating expenses prescribed by the Interstate Commerce Commission for railroads differs from the standard classification of operating expenses prescribed by the Interstate Commerce Commission for other public service corporations, such other public service corporations shall be entitled to the same operating expenses as prescribed for railroads. From the net operating income thus ascertained shall be deducted 'uncollectible revenue' and taxes paid in this State for the income year other than income taxes, and the balance shall be deemed to be their net income taxable under this article. In determining the taxable income of a corporation engaged in the business of operating a railroad under this section in the case of a railroad located entirely within this State, the net operating income shall be increased or decreased to the extent of any credit or debit balance received or paid, as the case may be, on account of car or locomotive hire; and when any railroad is located

partly within and partly without this State, the said net operating income shall be increased or decreased to the extent of an equal mileage proportion within this State of any credit or debit balance received or paid, as the case may be, on account of car or locomotive hire.

For the purposes of this section the words 'interstate business' shall mean, as to transportation companies, operating revenue earned within the State by reason of the interstate transportation of persons or property into, out of, or through this State, and as to transmission companies the interstate transmission of messages into, out of, or through the State.

The words 'equal mileage proportion within the State' shall mean the proportion of revenue received by the company operating in this State from interstate business as defined in the preceding paragraph, which the distance of movement over lines in this State bears to the total distance of movement over lines of the company receiving such revenue. If the Commissioner of Revenue shall find, with respect to any particular company, that its accounting records are not kept so as to reflect with exact accuracy such division of revenue by State lines as to each transaction involving interstate revenue, the Commissioner of Revenue may adopt such regulations, based upon averages, as will approximate with reasonable accuracy the proportion of interstate revenue actually earned upon lines in this State.

The words 'proportionate average of 'operating expenses' or 'operating ratio' ' shall mean the proportion of gross revenue of a company, on its whole business absorbed in operating expenses, as defined in the Interstate Commerce Commission classification of accounts.

In determining the taxable income of a railroad com-

pany operating two or more lines of railroad not physically connected, and when one of such railroad lines is located wholly within this State, the actual earnings and expenses of such line in this State, in so far as they may be severable, shall be used in determining net income taxable in this State.

With respect to leased lines operated in this State where the operating company pays a tax on the income earned on such leased lines, without deduction for lease rental, and on a sum properly allocable to such leased lines equal to the amount of lease rental paid, such lease rental shall not be taxable income against the lessor: provided that the stockholders of any such lessor corporation who receive dividends on their stock in such corporation shall be entitled to such income tax exemption with respect to such dividends as they would have had if the lessor corporation had paid an income tax on such exempted lease rental.

All other public service corporations shall file under Section 105-134.

In any case when the State of North Carolina jointly with the federal government has made any advances or has made any loans to a nonoperating railroad in which the State of North Carolina owns more than a majority of the capital stock, which advances or loans are made for the purpose of rehabilitating the properties of such railroad and are to be repaid by the operating railroad in the form of special and additional rents, such special or additional rents so paid shall be deducted from operating revenues in determining the net taxable income of such operating railroad. This deduction shall be allowable for the taxable years beginning with the year ending December thirty-first, one thousand nine hundred and forty-four, and subsequent years."

In 1951 a minor change was made in the first Paragraph of the Statute herein referred to as North Carolina General Statute 105-136 by the 1951 Session Laws of North Carolina, Chapter 643, Section 4, subsection (a). By subsection (k) thereof the amendment became effective January 1, 1951. The first Paragraph, as amended, then read as follows:

> *"Section 105-136 Railroads and public service corporations.*
>
> The basis of ascertaining the net income of every corporation engaged in the business of operating a steam, electric railroad, express service, telephone and telegraph business, or other form of public service, when such company is required by the Interstate Commerce Commission, the Federal Communications Commission or any successor Federal regulatory agency to keep records according to its standard classification of accounting or other prescribed accounting system, shall be the 'net revenue from operations' of such corporations as shown by their records, kept in accordance with that standard classification of accounts or other prescribed accounting system when their business is wholly within this State, and when their business is in part within and in part without the State, their net income within the State shall be ascertained by taking their gross 'operating revenues' within this State, including in their gross 'operating revenues' within this State the equal mileage proportion within this State of their interstate business, and deducting from their gross 'operating revenues' the proportionate average of 'operating expense' or 'operating ratio' for their whole business, as shown by the Interstate Commerce Commission standard classification of accounts: Provided, that if the standard classification of operating expenses pre-

scribed by the Interstate Commerce Commission for railroads differs from the standard classification of operating expenses prescribed by the Interstate Commerce Commission for other public service corporations, such other public service corporations shall be entitled to the same operating expenses as prescribed for railroads. From the net operating income thus ascertained shall be deducted 'uncollectible revenue' and taxes paid in this State for the income year other than income taxes, and the balance shall be deemed to be their net income taxable under this article. In determining the taxable income of a corporation engaged in the business of operating a railroad under this section in the case of a railroad located entirely within this State, the net operating income shall be increased or decreased to the extent of any credit or debit balance received or paid, as the case may be, on account of car or locomotive hire; and when any railroad is located partly within and partly without this State, the said net operating income shall be increased or decreased to the extent of an equal mileage proportion within this State of any credit or debit balance received or paid, as the case may be, on account of car or locomotive hire."

The statute herein referred to as General Statute of North Carolina 105-134, was amended in 1953 by the 1953 Session Laws of North Carolina, chapter 1302, section 4 and as amended read as follows:

"Section 105-134. *Corporations.*

I. Domestic Corporations.—

Every corporation organized under the laws of this State shall pay annually an income tax equivalent to six per cent on the entire net income, as herein defined, re-

ceived by such corporation during the income year.

II. Foreign Corporations.—

Every foreign corporation doing business in this State shall pay annually an income tax equivalent to six per cent of a proportion of its entire net income, to be determined according to the following rules:

'1. If the principal business of a corporation in this State is manufacturing (including mining, and all processes of fabricating or of curing raw materials) or is in any form of collecting, buying, assembling, or processing goods and materials, the entire net income of such corporation shall be apportioned to North Carolina on the basis of the ratio obtained by taking the arithmetical average of the following two ratios:

(a) Property. The ratio of the value of real estate and tangible personal property owned by such corporation in this State at the close of the income year of such corporation, to the value of the entire real estate and tangible personal property owned by it everywhere at the close of the income year of such corporation, except that inventories of goods, wares and merchandise shall be valued on the basis of the monthly or other periodic average during the income year of such corporation. If the taxpayer does not take or keep records of monthly or other periodic inventories, or, if in the opinion of the Commissioner of Revenue the method and time of taking or keeping records of such inventories does not accurately reflect the true average inventory, the Commissioner shall determine the proper amount from such information as may be available.

As used in this paragraph (a):

(i) The words 'tangible personal property' shall mean corporeal property such as machinery, tools, im-

plements, goods, wares and merchandise, and shall not mean cash on hand or in bank, shares of stock, bonds, notes, accounts receivable, credits, special privileges, franchises, good will, evidence of an interest in property or evidences of debt.

(ii) The word 'value' as applied to property other than inventories shall mean original cost plus additions and improvements less reserve for depreciation, unless in the opinion of the Commissioner of Revenue the peculiar circumstances in any case justify a different basis, in which event the Commissioner may construe 'value' to mean fair market value. Inventories shall be valued in accordance with the accounting practice of the corporation, unless in the opinion of the Commissioner of Revenue a different method is required in order to better reflect the net income of the corporation. In determining the value of property no deductions shall be made for encumbrances thereon.

(b) Cost of Manufacturing. The ratio of the total cost of manufacturing, collecting, buying, assembling or processing by such corporation within the State during the income year of the corporation to the total cost of manufacturing, collecting, buying, assembling or processing by such corporation within and without the State during such income year.

As used in Paragraph (b), the words 'cost of manufacturing, collecting, buying, assembling or processing' shall be interpreted in a manner to conform as nearly as possible to the best accounting practices in the trade or business. Unless in the opinion of the Commissioner of Revenue the peculiar circumstances in any case justify a different basis, said words shall be construed to include as elements of cost the following:

(i) The total cost of all goods, materials and supplies used in manufacturing, assembling or processing regardless of where purchased.

(ii) The total wages and salaries paid or accrued during the income year in such manufacturing, assembling or processing activities; and

(iii) The total overhead or manufacturing burden properly assignable by good accounting practices to such manufacturing, assembling or processing activities, not including, however, property, privilege, stamp or other taxes.'

'2. If the principal business of a corporation in this State is selling, distributing or dealing in tangible personal property, the entire net income of such corporation shall be apportioned to North Carolina on the basis of the ratio obtained by taking the arithmetical average of the two following ratios:

(a) Property. The ratio of the value of real estate and tangible personal property owned by such corporation in this State at the close of the income year of such corporation, to the value of the entire real estate and tangible personal property owned by it everywhere at the close of the income year of such corporation, except that inventories of goods, wares and merchandise shall be valued on the basis of a monthly or other periodic average during the income year of such corporation. If the taxpayer does not take or keep records of monthly or other periodic inventories, or, if in the opinion of the Commissioner of Revenue the method and time of taking such inventories does not accurately reflect the true average inventory, the Commissioner shall determine the proper amount from such information as may be available.

As used in this Paragraph (a):

(i) The words 'tangible personal property' shall mean corporeal property such as machinery, tools, implements, goods, wares and merchandise, and shall not mean cash on hand or in bank, shares of stocks, bonds, notes, accounts receivable, credits, special privileges, franchises, good will, evidence of an interest in property or evidences of debt.

(ii) The word 'value' as applied to property other than inventories shall mean original cost plus additions and improvements less reserve for depreciation, unless in the opinion the Commissioner of Revenue the peculiar circumstances in any case justify a different basis, in which event the Commissioner may construe 'value' to mean fair market value. Inventories shall be valued in accordance with the accounting practice of the corporation, unless in the opinion of the Commissioner of Revenue a different method is required in order to better reflect the net income of the corporation. In determining the value of property no deductions shall be made for encumbrances thereon.

(b) Sales. The ratio of the total sales made by such corporation through or by offices, agencies, or branches located in North Carolina during the income year of such corporation to the total sales made by such corporation everywhere during such income year. The word 'sales' is hereby construed to include 'rentals' "

"3. If the principal business in this State of a corporation is other than described in subsection 1 or subsection 2 of subdivision II of this section, then the total income of such corporation shall be apportioned to North Carolina on the basis of the ratio of its gross receipts in this State during the income year to its gross receipts for such year within and without the State.

(a) The words 'gross receipts' as used in this subsection shall be taken to mean and include the entire receipts for business done by such company."

"4. If any corporation believes that the method of allocation or apportionment hereinbefore described as administered by the Commissioner of Revenue has operated or will so operate as to subject it to taxation on a greater portion of its net income than is reasonably attributable to business or earnings within the State, it shall be entitled to file with the Tax Review Board a petition setting forth the facts upon which its belief is based and its argument with respect to the application of the allocation formula. This petition shall be filed in such form and within such time as the Tax Review Board may prescribe. The Board shall grant a hearing thereon. At least two members of the Tax Review Board shall attend any hearing pursuant to such petition. An informal record containing in substance the evidence, contentions and argument presented at the hearing shall be made. All three members of the Board shall consider such evidence, contentions and arguments, and the decision thereon shall be made by a majority vote of the Board. If the Board shall find that the application of the allocation formula subjects the corporation to taxation on a greater portion of its income or earnings than is reasonably attributable to its business or earnings within this State:

(a) The Board shall be authorized to add to the factors of the applicable allocation formula or substitute for one of such factors, depending upon whether such addition or substitution, in the opinion of the Board, more accurately reflects the income attributable to this State, the following factor: The ratio of all salaries, wages, commissions and other compensation paid

or incurred by the taxpayer in this State for services performed in connection the trade or business of the taxpayer during the income year to the total salaries, wages, commissions and other compensation paid or incurred by the taxpayer in connection with its entire trade or business wherever conducted during the income year. For the purpose of this Section all salaries, wages, commissions and other compensation paid to residents of North Carolina shall be deemed to have been paid or incurred in this State irrespective of the place of actual payment.

(b) If the corporation shall employ in its books of account a detailed allocation of receipts and expenditures which reflects more clearly than the applicable allocation formula or alternative formulas prescribed by this Section the income attributal to the business within this State, applicable for permission to base the return upon the taxpayer's books of account shall be considered by the Tax Review Board. The Board shall be authorized to permit such separate accounting method in lieu of applying the applicable allocation formula if the Board deems such method proper as best reflecting the income and earnings attributable to this State.

(c) If the corporation shall show that any other method of allocation than the applicable allocation formula or alternative formulas prescribed by this Section reflects more clearly the income attributable to the business within this State, applicable for permission to base the return upon such other method shall be considered by the Tax Review Board. The application shall be accompanied by a statement setting forth in detail, with full explanations, the method the taxpayer believes will more nearly reflect its income from business within this State. If the Board shall conclude that the allocation

formula and the alternative formulas prescribed by this Section allocate to this State a greater portion of the net income of the corporation than is reasonable attributal to business or earnings within this State, it shall determine the allocable net income by such other method as it shall find best calculated to assign to this State for taxation the portion of the net income of the corporation reasonably attributable to its business or earnings within this State.

There shall be a presumption that the appropriate allocation formula reasonably attributes to this State the portion of the corporation's income earned in this State and the burden shall rest upon the corporation to show the contrary. The relief herein authorized shall be granted by the Board only in cases of clear, cogent and convincing proof that the petitioning taxpayer is entitled thereto. No corporation shall use any alternative formula or method other than the applicable allocation formula provided by statute in making a report or return of its income to this State except upon order in writing of the Board and any return in which any alternative formula or other method other than the applicable allocation formula prescribed by statutes is used without the permission of the Board, shall not be a lawful return.

When the Board determines, pursuant to the provisions of this Article, that an alternative formula or other method more accurately reflects the income allocable to North Carolina and renders its decision with regard thereto, the corporation shall allocate its net income for future years in accordance with such determination and decision of the Board so long as the conditions constituting the basis upon which the decision was made remain unchanged or until such time as the busi-

ness method of operation of the corporation changes. Provided, however, that the Commissioner of Revenue may, in his discretion, with respect to any subsequent year, require the corporation to furnish information relating to its property, operations and activities.

A corporation which proposes to do business in this State may file a petition with the Board setting forth the facts upon which it contends that the applicable allocation formula will allocate a greater portion of the corporation's future income to North Carolina than will be reasonably attributable to its proposed business or contemplated earnings within the State. Upon a proper showing in accordance with the procedure described above for determinations by the Board, the Board may authorize such corporation to allocate income from its future business to North Carolina on the basis prescribed by the Board under the provisions of this Section for such future years as the conditions constituting the basis upon which the Board's decision is made remain unchanged and the business operations of the corporation continue to conform to the statement of proposed methods of business operation presented by the corporation to the Board.

For purposes of appeal to the State Board of assessment or the courts, hearings and determinations by the Commissioner of Revenue, and all provisions of law dealing with such appeals shall be so construed."

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MAR 27 19
JAMES R. BROWNING, Clerk

In The
SUPREME COURT of the UNITED STATES

OCTOBER TERM, 1958

No. 524

ET&WNC TRANSPORTATION COMPANY,
a corporation,
Appellant
vs.
JAMES S. CURRIE, Commissioner of Revenue of
the State of North Carolina,
Respondent

ON APPEAL FROM THE SUPREME COURT OF NORTH CAROLINA

Decided March 2, 1959
Opinion Per Curiam

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In The
SUPREME COURT of the UNITED STATES
OCTOBER TERM, 1958

No. 524

ET&WNC TRANSPORTATION COMPANY,
a corporation,
Appellant

vs.

JAMES S. CURRIE, Commissioner of Revenue of
the State of North Carolina,
Respondent

ON APPEAL FROM THE SUPREME COURT OF NORTH CAROLINA

Decided March 2, 1959
Opinion Per Curiam

PETITION FOR REHEARING

MAY IT PLEASE THE HONORABLE COURT:

Appellant, ET&WNC Transportation Company, respectfully and deferentially presents this its petition for a rehearing of the above entitled cause.

GROUNDS FOR REHEARING

Appellant is much aggrieved by the Opinion Per Curiam entered by this Honorable Court in the above entitled case on March 2, 1959, in which the judgment of the learned Supreme Court of the State of North Carolina was affirmed by this Court on the authority of *Northwestern States Portland Cement Co.* v. *Minnesota,* No. 12, October Term, 1958, decided February 24, 1959, and *Williams, as State Revenue Commissioner* v. *Stockham Valves and Fittings, Inc.,* No. 33, October Term, 1958, decided February 24, 1959.

Appellant craves the further indulgence of the Court in distinguishing its case from the *Northwestern* and *Stockham* cases because it does not believe that they are decisive or controlling of its case for the reason that the alleged taxpayers in those cases were not operating under a specific grant of authority from the Congress of the United States which authorized and permitted them to operate in said States irrespective of State law; whereas, all of Appellant's activities in North Carolina are authorized by and under the protection of the Federal Motor Carrier Act of Congress of 1935 as amended (49 U.S.C.A. 301 et seq.), which is authorized by and founded on the Commerce Clause of the Federal Constitution (U. S. Const. Art. 1, Sec. 8, Cl. 3).

Appellant does nothing in North Carolina which that State has the power to prohibit; whereas, even though *Northwestern* and *Stockham* did not in fact domesticate in their respective States, Minnesota and Georgia, it may be that under the laws of those States they should have domesticated and without domesticating the States might have prohibited their local activities, though the decisions in those cases do not rest on that basis.

THE EFFECT OF THE COURT'S DECISION

Appellant respectfully submits that the practical effect of the Honorable Court's decision in sustaining the tax in question is to permit North Carolina to add a condition to the Federal Motor Carrier Act of 1935 requiring it, as an exclusively interstate carrier in North Carolina, to pay said tax or cease its operations in that State as no carrier could continue to operate without paying the tax.

Section 105-161 of the General Statutes of North Carolina provides:

1. That a failure to file a return and pay the tax when due subjects the taxpayer to the payment of an additional amount equal to 5% thereof;

2. That a failure to file and pay within 60 days after due date subjects the taxpayer to an additional amount equal to 25% thereof and authorizes the issuance of a writ of mandamus; and,

3. That a willful failure to pay the tax as required shall, in addition to the other penalties, make the taxpayer guilty of a misdemeanor and, upon conviction thereof, subject to

a fine of not more than $500.00 or imprisonment not exceeding six months, or both fine and imprisonment at the discretion of the Court.

Section 105-242 of said North Carolina Statutes provides that if the tax is not paid within 30 days after due date the Commissioner of Revenue shall issue an order to the Sheriff of any County of the State, commanding him to levy upon and sell the property of the taxpayer for the payment of the tax with added penalties, additional taxes, interest and cost, etc.

So it is the practical effect of the North Carolina income tax law to require Appellant to pay the tax or stop hauling freight into and out of that State.

On the other hand, this Court held in *Castle* v. *Hayes Freight Line*, 348 U. S. 61, 99 L. ed. 68, 75 S. Ct. 191, that:

> "Congress in the Motor Carrier Act adopted a comprehensive plan for regulating the carriage of goods by motor truck in interstate commerce. The federal plan of control was so all-embracing that former power of states over interstate motor carriers was greatly reduced. No power at all was left in states to determine what carriers could or could not operate in interstate commerce. Exclusive power of the Federal Government to make this determination is shown by § 306 of 49 USC which describes the conditions under which the Interstate Commerce Commission can issue certificates of convenience and necessity."

THE CONTROLLING FACTS

All of the facts in this case are stipulated by the agreement of both Appellant and Respondent and there is a concurrent finding of both North Carolina Courts that such stipulated facts are the facts of this case.

Appellant believes that the controlling and decisive facts are:

(1) That it is a Delaware corporation engaged, exclusively in North Carolina, as a common carrier of freight for compensation by motor vehicle in interstate commerce under the Federal Motor Carrier Act of 1935 and the Interstate Commerce Clause of the Federal Constitution.

(2) It is not domesticated in North Carolina and has never been domesticated in that State.

(3) It has no intrastate business in North Carolina and has never had. It does nothing in North Carolina which is not necessary for its interstate business.

(4) It owns no property, real or personal, in North Carolina except such property as is necessary for its interstate business.

(5) The only freight handled in North Carolina is that which either originates outside of North Carolina or is destined to points outside of that State.

(6) It does an interstate transportation business only between the States of North Carolina, South Carolina, Virginia, Tennessee and Georgia.

(7) Its principal office is in Johnson City, Tennessee. It has no principal office in North Carolina. In fact, it has no offices of any kind in North Carolina except such as are incident to and necessary for its interstate operations in North Carolina.

(8) Notwithstanding its business in North Carolina is exclusively interstate, it paid $48,954.00 of taxes in that State for the fiscal year ending June 30, 1954.

(9) The alleged income taxes paid under protest and sued for in this case amount to $15,812.80, together with interest and costs.

(10) All procedural steps necessary for recovery of said taxes have been taken by Appellant.

(R. pp. 21-32)

PROPOSITIONS OF LAW

Appellant respectfully insists:

(1) That North Carolina cannot prohibit it doing an interstate business in that State.

(2) That an income tax is, to all practical purposes, an excise tax or a privilege tax.

That the income tax sought to be recovered by Appellant is a direct tax upon earnings derived exclusively from interstate commerce for the privilege of earning income in North Carolina and, in effect, said tax has been so designated by the Supreme Court of that State.

(3) That the designation of the tax, or a particular name given to it, cannot take away the Court's duty to consider its true nature and effect of the tax which would be the same under any other name, and the holding of the learned Supreme Court of North Carolina that there is a distinction to be made between the nature of that State's excise tax imposed for the privilege of transacting business within the State and the nature of the income tax involved here, "which is based on a past fact of earned net profits" is not well taken.

(4) That Appellant's earnings, as is its business, or as are its activities, in all of the States in which it operates, are inseparable and no part of its earnings, business or activities may be separated and allocated to any State in which it operates for the purpose of State taxation.

(5) That the income tax sought to be recovered is a direct burden on interstate commerce, and as such said tax is prohibited by the Interstate Commerce Clause of the Federal Constitution, irrespective of how said tax is apportioned.

(6) That the situation here is different from one where the alleged taxpayer is a resident, or has the privilege of residence, or has a domicile in the taxing State, or should have such.

(7) That the local business of a foreign corporation may support an excise tax measured in any reasonable way, if neither interstate commerce nor property beyond the taxing state is taxed.

The apportionment of net income sought to be taxed, or

apportioned and taxed, is immaterial if the tax is laid on interstate commerce or on account of interstate transactions.

(8) That there is no substantial difference in a State laying a tax on the privilege of engaging in interstate commerce and in laying the said tax on (the privilege of) earning an income from interstate transactions, and the Court has struck down State taxes laid on exclusively interstate business.

(9) That under the holding of the Honorable Court in the *Northwestern* and *Stockham* cases, interstate commerce may be subjected to the burden of multiple taxation, and the possibility of such taxation, in and of itself, is a burden on interstate commerce. So is the burden of showing multiple taxation. The expense and time involved are prohibitive.

(10) In taxing Appellant as in this case, and other undomesticated foreign corporations carrying on an exclusively interstate transportation business under said Motor Carrier Act of 1935, North Carolina has erected a wall around its borders preventing an entry of commerce from other States, or preventing the free flow of commerce from other States, unless such commerce pays said income tax, as it cannot be contended that Appellant can continue to haul freight into and out of North Carolina if it refuses to pay said tax.

It may be that the commerce resulting in the earnings taxed has ended so far as that tax is concerned, and certainly it has ended so far as all future commerce is concerned unless that tax is paid, as no carrier, interstate or

otherwise, can haul freight, from one State to another or otherwise, with distress warrants for delinquent taxes in the hands of the sheriff.

(11) It is impossible for Appellant to show that the burden of the taxes sought to be recovered is reasonably related to the powers of North Carolina and North Carolina has no power to nullify the Federal Motor Carrier Act and prevent Appellant from hauling freight into and out of that State.

But, assuming that the amount of the tax sought could be balanced as against the powers of the taxing State, who can say when a State has overstepped its bounds in laying a tax on net income from interstate commerce which may be taxed only to the extent that such income is fairly related to the corporate activities of the taxpayer within the taxing State. For that reason alone the constitutional infirmity in the tax in question is believed to exist no matter how the tax is apportioned, under both the Interstate Commerce Clause and also under the Due Process Clause.

(12) That Appellant does "pay its way".

ARGUMENT AND AUTHORITIES RELIED ON

Taking up the foregoing propositions in the order stated, Appellant respectfully submits:

(1) That it is a Delaware corporation, undomesticated in North Carolina and not subject to domestication in that State. That its principal office is in Johnson City, Tennessee from which its operations are directed; that it has no office or property in North Carolina except such as is

necessary in its interstate business, and that it does nothing in North Carolina except haul freight either in or out of that State, and such other acts as are necessary therefor. Its operations are entirely under said Federal Motor Carrier Act and the Commerce Clause of the Federal Constitution.

As said by this Court in *Railway Express Agency, Inc.* v. *Virginia*, 347 U. S. 359, 98 L. ed. 757, 74 S. Ct. 558:

> "As a consequence of the State's own policy, this appellant does no business in Virginia which the State has power to prohibit but does only such as it can conduct under protection of the Commerce Clause of the Federal Constitution." (p. 361)

(2) The North Carolina income tax is, to all practical purposes, an excise tax and has been so designated indirectly by the North Carolina Supreme Court.

In *Maxwell* v. *Mfg. Co.*, 204 NC 365, decided in 1933, and affirmed by the Supreme Court of the United States in 78 L. ed. 1040, 291 US 642, this Court, construing Section 311(a), Chapter 345 of the Revenue Act of 1929, predecessor to Section 105-134, stated:

> "The tax imposed on income by the Revenue Acts of this state is not a tax on property within the meaning of the requirement of the Constitution, Article V, Section 3, that property shall be taxed according to its true value in money."

Among the many decisions cited as authority for this

statement was *Hattiesburg Grocery Co.* v. *Robertson*, 126 Miss. 34, 88 So. 4, 260 US 710, 67 L. ed. 475.

The Hattiesburg case is also reported in 25 ALR 748, and on p. 753 of that report, the Court says:

> "While a tax on income includes some of the elements both of a tax on property and a tax on persons, it cannot be classified as strictly a tax on either, for it is generically and necessarily an excise, and should be enforced as such unless and until so to do would accomplish the result, which Section 112 of the Constitution was adopted to prevent. . ."

(3) Even though the learned Supreme Court of North Carolina designates the tax as one which is laid "on a past fact of earned net profits" rather than on "the privilege of transacting business within the State", and specifically as Appellant insists, on the alleged privilege of earning an income or net income in North Carolina, (Jurisdictional Statement p. 39), this Court will consider the realistic or practical nature and effect of the tax.

As stated by the learned North Carolina Supreme Court, we must "come to grips with realities, not shadows." (Jur. St. p. 39)

As stated by this Court in *Railway Express Agency, Inc.* v. *Virginia*, supra:

> "While great respect is due these conclusions, it has long been held that in a case involving the line between permissible state taxation of property at its full value, including going-concern value, and prohibited taxa-

tion of gross receipts from interstate commerce, "neither the state courts nor the legislatures, by giving the tax a particular name or by the use of some form of words, can take away our duty to consider its nature and effect," *Galveston, H. & S. A. R. Co. v. Texas*, 210 US 217, 227, 52 L ed 1031, 1037, 28 S Ct 638, in which inquiry "we are concerned only with its practical operation." (p. 363)

(4) Practically speaking, and realistically, Appellant's earnings as its activities are inseparable and no part of either may be allocated to any State for the purpose of State taxation.

This Court said in the case of *Michigan-Wisconsin P. L. Co. v. Calvert*, 347 U. S. 157, 98 L. ed. 583, 74 S. Ct. 396 that:

> "It is now well settled that a tax imposed on a local activity related to interstate commerce is valid if, and only if, the local activity is not such an integral part of the interstate process, the flow of commerce, that it cannot realistically be separated from it."

In *Railway Express Agency, Inc. v. Virginia, supra*, this Court said:

> "Here the State excises every receipt from movement of express in interstate commerce. It takes a portion of gross revenue from "all receipts earned in this State on business passing through, into or out of this State." It contends that this obvious burden on interstate commerce is validated by state protection of

a localized incident in the course of the business. The three incidents are originating the interstate movement, which required local pickup of the parcels; terminating the movement, which each of these incidents is sufficient warrant for taxing gross revenues from wholly interstate commerce, a concern doing a nation-wide business is vulnerable to a gross revenue tax in every one of the forty-eight states. But it is argued that this is permissible, provided the states formulate their burden so as each to burden it proportionately, not encroaching on the other's right to burden. It is enough to say that we recently have ruled that local incidents such as gathering up or putting down interstate commodities as an integral part of their interstate movement are not adequate grounds for a state license, privilege or occupation tax."

In the case of *Cooney* v. *Mountain States Telea. and Teleph. Co.*, 294 U. S. (384-394) 70 L. ed. 934, 942, this Court said:

"In the instant case, the tax, being indivisible and indiscriminate in its application, necessarily burdens interstate commerce. We do not pass upon the other questions presented."

In the case of *Memphis Natural Gas Company* v. *Stone*, 335 U. S. 80-105, 92 L. ed. 1832, 1840, this Court said:

"However, a state tax upon a corporation doing only an interstate business may be invalid under our decisions because levied (1) upon the privilege of doing interstate business within the state, or (2) upon

some local event so much a part of interstate business as to be in effect a tax upon the interstate business itself."

(5) The income tax sought to be recovered in this case is a direct burden on interstate commerce.

In the case of *Atlantic L. Co.* v. *Com'r of Corp. and Taxn.*, 298 U. S. 553, 80 L. ed. 1328, this Court said:

> "If appellant did nothing but transact interstate business, the tax would constitute a burden upon that commerce, and could not stand under the commerce clause of the Constitution. *Alpha Portland Cement Co.* v. *Massachusetts*, 268 U. S. 203, 69 L. ed. 916, 45 S. Ct. 477, 44 A. L. R. 1219; *Cheney Bros. Co.* v. *Massachusetts*, 246 U. S. 147, 153, 62 L. ed. 632, 636, 38 S. Ct. 295; *Ozark Pipe Line Corp.* v. *Monier*, 266 U. S. 555, 562 et seq., 69 L. ed. 439, 442, 45 S. Ct. 184."

In the case of *Leloup* v. *Port of Mobile*, 127 U. S. 640, 648, 32 L. ed. 311, 314, this Court said:

> "In our opinion such a construction of the Constitution leads to the conclusion that no State has the right to lay a tax on interstate commerce in any form, whether by way of duties laid on the transportation of the subjects of that commerce, or on the receipts derived from that transportation, or on the occupation or business of carrying it on, and the reason is that such taxation is a burden on that commerce, and amounts to a regulation of it, which belongs solely to

Congress. This is the result of so many recent cases that citation is hardly necessary."

In the case of *Cooney* v. *Mountain States Teleph. & Teleg. Co.*, 294 U. S. 384-390 79 L. ed. 934, 942, this Court said:

"Where the tax is exacted from one doing both an interstate and intrastate business, it must appear that it is imposed solely on account of the latter; that the amount exacted is not increased because of the interstate business done; *that one engaged exclusively in interstate commerce would not be subject to the tax; and that the one who is taxed could discontinue the intrastate business without also withdrawing from the interstate business.*" (Emphasis Ours)

(6) The situation here is different from one where the alleged taxpayer is a resident or has a domicil in the taxing State or should be domesticated in that State.

In *Memphis Natural Gas Company* v. *Beeler*, 315 U. S. 649-657, 85 L. ed. 1090, this Court said:

"In any case, even if taxpayer's business were wholly interstate commerce, a nondiscriminatory tax by Tennessee upon the net income of a foreign corporation having a commercial domicile there cf. *Wheeling Steel Corp.* v. *Fox*, 298 US 193, 80 L ed 1143, 56 S Ct. 773, supra, or upon net income derived from within the state, *Shaffer* v. *Carter*, 252, US 37, 57, 64 L ed 445, 458, 40 S Ct. 221; *Wisconsin* v. *Minnesota Min. & Mfg. Co.* 311 US 452, 85 L ed 274, 61 S Ct.

253; cf. *New York ex rel Cohn* v. *Graves*, 300 US 308, 81 L ed 666, 57 S Ct 466, 108 ALR 721, is not prohibited by the commerce clause on which alone taxpayer relies." (p. 656)

In the case of *Spector Motor Service* v. *O'Connor*, 340 U. S. 602-615, 95 L ed. 573, this Court said:

> "This Court heretofore has stuck down, under the Commerce Clause, state taxes upon the privilege of carrying on a business that was *exclusively* interstate in character. The constitutional infirmity of such a tax persists no matter how fairly it is apportioned to business done within the state. *Alpha Portland Cement Co.* v. *Massachusetts*, 268 US 203, 69 L. ed. 916, 45 S Ct. 477, 44 ALR 1219 (measured by percentages of "corporate excess" and net income); *Ozark Pipe Line Corp.* v. *Monier*, 266 U. S. 555, 69 L. ed. 439, 45 S. Ct. 184 (Measured by percentage of capital stock and surplus). See *Interstate Oil Pipe Line Co.* v. *Stone*, 337 U. S. 662, 669 et seq., 93 L. ed. 1613, 1621, 69 S. Ct. 1264 (dissenting opinion which discusses the issue on the assumption that the activities were in interstate commerce); *Joseph* v. *Carter & Weekes Stevedoring Co.* 330 US 422, 91 L ed 993, 67 S Ct. 815; *Freeman* v. *Hewit*, 329 US 249, 91 L ed 265, 67 S Ct. 274, supra." (p. 609)

(7) The local business of a foreign corporation may support a reasonable excise tax if neither interstate commerce nor property beyond the taxing State is taxed.

In the case of *Alpha Portland Cement Co.* v. *Massachu-*

setts, 268 U. S. 203-220, 69 L. ed. 916, this Court said:

> "The local business of a foreign corporation may support an excise measured in any reasonable way, if neither interstate commerce nor property beyond the state is taxed. *Underwood Typewriter Co.* v. *Chamberlain*, 254, U. S. 113, 65 L. ed. 165, 41 Sup. Ct. Rep. 45, approved such an excise measured by income reasonably attributed to intrastate business; but nothing there said was intended to modify well-established principles. It must be read with the essential facts in mind. Local business was a sufficient basis for the excise, and there was no taxation of interstate commerce or property beyond the state. Of course, the opinion does not support the suggestion that the present statute is free from the fatal objections to the former one because payment of the tax is no longer a condition precedent to carrying on any business." (p. 219)

(8) As said by the learned Supreme Court of North Carolina, "we must come to grips with realities and not shadows," (Jur. St. p. 39), and as said by this Court in *Spector Motor Service* v. *O'Connor*, supra:

> "It is not a matter of labels. The incidence of the tax provides the answer." (p. 608-9)

And Appellant insists that there is no substantial difference between a State laying a tax on a corporation engaging in interstate activities and the same corporation earning an income from the same activities. The income is but a continuation or end result of said activities which are in-

separable and all a part of interstate commerce. One cannot exist or survive without the other.

As said by this Court in the Spector Motor Carrier case, supra:

> "The incidence of the tax is upon no intrastate commerce activities because there are none. Petitioner is engaged only in interstate transportation. Its principal place of business is in Illinois. It is authorized by the Interstate Commerce Commission to do certain interstate trucking and by the Connecticut Public Utilities Commission to do part of such interstate trucking in Connecticut. Petitioner has filed with the Secretary of State of Connecticut a certificate of its incorporation in Missouri, has designated an agent in Connecticut for service of process and has paid the state fee required in that connection. It has not been authorized by the State of Connecticut to do intrastate trucking and does not engage in it. See *Terminal Taxicab Co.* v. *Kutz*, 241 US 252, 253, 254 60 L ed 984, 986, 36 S Ct 583, Ann Cass 1916D 765." (pp. 606-7)

Petitioner's business in North Carolina in much similar to that of Spector as last above described. (Jur. St., pp. 60-61)

As said by Mr. Justice Clark in the dissenting opinion of this Court in *Railway Express Agency, Inc.* v. *Virginia, supra*, concurred in by the Chief Justice, Mr. Justice Black and Mr. Justice Douglas:

> "The constitutionality of a State's tax laws should

not depend on the ability of State legislatures to foresee what tax language would most likely meet this Court's approval." (p. 372)

9. The possibility of multiple taxation is, in and of itself, a burden on interstate commerce.

As said by this Court in *Freeman* v. *Hewit*, 329 U. S. 249-286, 91 L. ed. 264, 274:

> "It is suggested, however, that the validity of a gross sales tax should depend on whether another State has also sought to impose on its burden on the transactions. If another State has taxed the same interstate transaction, the burdensome consequences to interstate trade are undeniable. But that, for the time being, only one State has taxed is irrelevant to the kind of freedom of trade which the Commerce Clause generated. The immunities implicit in the Commerce Clause and the potential taxing power of a State can hardly be made to depend, in the world of practical affairs, on the shifting incidence of the varying tax laws of the various States at a particular moment. Courts are not possessed of instruments of determination so delicate as to enable them to weigh the various factors in a complicated economic setting which, as to an isolated application of a State tax, might mitigate the obvious burden generally created by a direct tax on commerce. Nor is there any warrant in the constitutional principles heretofore applied by this Court to support the notion that a State may be allowed one single-tax-worth of direct interference with the free flow of commerce. An exaction by a State from inter-

state commerce falls not because of a proven increase in the cost of the product. What makes the tax invalid is the fact that there is interference by a State with the freedom of interstate commerce. Such a tax by the seller State alone must be judged burdensome in the context of the circumstances in which the tax takes effect. Trade being a sensitive plant, a direct tax upon it to some extent at least deters trade even if its effect is not precisely calculable. Many States, for instance, impose taxes on the consumption of goods, and such taxes have been sustained regardless of the extra-State origin of the goods, or whether a tax on their sale had been imposed by the seller State. Such potential taxation by consumer States is but one factor pointing to the deterrent effect on commerce by a superimposed gross receipts tax."

This Court also said in the case of *McGoldrick* v. *Berwind-White Coal Min. Co.*, 309 U. S. 33-70, 84 L. ed. 565, 583:

"The taxation of the gross receipts in New York, on any appropriate view of what pertains to the interstate sales, would seem clearly to involve the *danger* of multiple taxation to which we have adverted in recent decisions." (Emphasis Ours)

In the case of *Joseph* v. *Carter & Weekes S. Co.*, 330 U. S. 422-445, 91 L. ed. 993, 1001:

"A power in a state to tax interstate commerce or its gross proceeds, unhampered by the Commerce Clause, would permit a multiple burden upon that com-

merce. This has been noted as ground for their invalidation . . . In the present case, the threat of a multiple burden, except in the few instances in the record of interstate, in distinction to foreign, commerce, is absent. The multiple burden on interstate transportation from taxation of the gross receipts from stevedoring arises from the possibility of a similar tax for unloading . . ."

"We reaffirm the rule of Puget Sound Stevedoring Company. "What makes the tax invalid is the fact that there is interference by a State with the freedom of interstate commerce." *Freeman* v. *Hewit, supra* (329 US 256, ante 274, 67 S Ct 274). Such a rule may in practice prohibit a tax that adds no more to the cost of commerce than a permissible use or sales tax. What lifts the rule from formalism is that it is a recognition of the effects of state legislation and its actual or probable consequences . . . The avoidance of such a local toll on the passage of commerce through a locality was one of the reasons for the adoption of the Commerce Clause."

10. The North Carolina income tax law, as construed and applied in this case, erects a wall around the borders of that State which prevents the free flow of commerce from other States.

In the case of *Michigan-Wisconsin P. L. Co.* v. *Calvert*, 347 U. S. 157, 98 L. ed. 538, 74 S. Ct. 396, this Court said:

"Such an aspect of interstate transportation cannot be "carve(d) out from what is an entire or integral

economic process," *Nippert* v. *Richmond*, *supra* (327 US at 423), by legislative whimsy and segregated as a basis for the tax. The separation must be realistic.

Here it is perhaps sufficient that the privilege taxed, namely the taking of the gas, is not so separate and distinct from interstate transportation as to support the tax. But additional objection is present if the tax be upheld. It would "permit a multiple burden upon that commerce," *Joseph* v. *Carter & Weekes Stevedoring Co.*, *supra* (330 US at 429), for if Texas may impose this "first taking" tax measured by the total volume of gas so taken, then Michigan and the other recipient states have at least equal right to tax the first taking or "unloading" from the pipeline of the same gas when it arrives for distribution. Oklahoma might then seek to tax the first taking of the gas as it crossed into that State. The net effect would be substantially to resurrect the customs barriers which the Commerce Clause was designed to eliminate. "The very purpose of the Commerce Clause was to create an area of free trade among the several States. That clause vested the power of taxing a transaction forming an unbroken process of interstate commerce in the Congress, not in the States." *McLeod* v. *J. E. Dilworth Co.*, 322 US 327, 330, 331, 88 L. ed. 1304, 1307, 64 S. Ct. 1023, 1030 (1944)"

11. It is an insurmountable obstacle for Appellant to show that the taxes sought to be recovered are reasonably related to the powers of the taxing State as there is no yardstick by which to measure either or to compare or balance one with the other.

In the case of *Michigan-Wisconsin P. L. Co. v. Calvert*, 347 U. S. 157, 98 L. ed. 583 74 S. Ct. 396, this Court said:

> "Numerous cases have upheld state levies where it is thought that the tax does not operate to discriminate against commerce or unduly burden it either directly or by the possibility of multiple taxation resulting from other taxes of the same sort being imposed by other states. The recurring problem is to resolve a conflict between the Constitution's mandate that trade between the states be permitted to flow freely without unnecessary obstruction from any source, and the state's rightful desire to require that interstate business bear its proper share of the costs of local government in return for benefits received. Some have thought that the wisest course would be for this Court to uphold all state taxes not patently discriminatory, and wait for Congress to adjust conflicts when and as it wished. But this view has not prevailed, and the Court has therefore been forced to decide in many varied factual situations whether the application of a given state tax to a given aspect of interstate activity violates the Commerce Clause." (p. 166)

12. The theory of the North Carolina income tax law being to require Appellant to "pay its own way," may it not be said that it does this in other taxes paid to North Carolina each year. During the fiscal year ending June 30, 1955 it paid $48,958.00 of taxes in North Carolina and during the fiscal year ending June 30, 1956 it paid like taxes of $47,412.00. (Jur. St. pp. 62, 63)

During the fiscal years ending from June 30, 1949 to June 30, 1959, both inclusive, the income taxes sued for in this case aggregated $15,812.80. (Jur. St. pp. 70-74)

CONCLUSION

In conclusion, Appellant respectfully insists that its case is not controlled or decided by the *Northwestern* and *Stockham* cases for the reasons hereinbefore set forth, and particularly that it is operated under a franchise or certificate of public convenience and necessity granted by the Congress of the United States, or rather by the Interstate Commerce Commission under the Federal Motor Carrier Act of the Congress of 1935 which authorizes and permits it to project its interstate truck lines into North Carolina regardless of the wishes or laws of that State, and any law of that State, including its income tax law involved here, which impedes or burdens its interstate operations, violates said Federal Motor Carrier Act, as well as the Commerce Clause of the Federal Constitution upon which it is founded.

Congress having assumed the all-embracing plan of control of interstate motor carriers, no power at all was left in the States to determine what carriers could or could not operate in interstate commerce, or to tax such carriers or their operations, regardless of any attempted allocation of income resulting exclusively from their interstate operations.

Appellant believes that there is a vast difference between a State tax laid against the income of a foreign, undomesticated common carrier corporation operating exclu-

sively in interstate commerce in North Carolina under a Federal franchise granted by the Interstate Commerce Commission under the Federal Motor Carrier Act of 1935 and in an income tax laid against the income of Northwestern and Stockham involved in the Minnesota and Georgia cases.

For the foregoing reasons it is respectfully urged that this petition for a rehearing be granted, and that, upon further consideration, the judgment of the Supreme Court of the State of North Carolina be reversed.

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CERTIFICATE OF COUNSEL

We, Kester Walton and James H. Epps, Jr, counsel for the above named Appellant, do hereby certify that the

foregoing petition for rehearing is presented in good faith and not for delay.

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